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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-~~72~~-1191

IRVING B. KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALPH WIENSHIENK, ESQ.
Attorney for Petitioner
Irving B. Kahn
10 East 40th Street
New York, New York
212-679-3260

PHILIP MANDEL
BERNARD ROTHMAN
and
PETER FLEMING JR.
JOHN E. SPRIZZO
100 Wall Street
New York, New York
Of Counsel

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	4
Statement of the Case	4
Reasons for Granting a Writ	6
I. The writ should be granted to settle important questions—including constitutional questions—arising out of the new perjury statute, 18 U.S.C. 1623. The first three cases to reach the Circuit Courts have produced a conflict on the question of whether 1623 is now the exclusive vehicle for prosecuting perjury before a grand jury, or whether the prosecutor has a right of election to proceed under either the new statute or under the old statute, 18 U.S.C. 1621	6
II. The Circuit Court decision represents a double attack upon the right of trial by jury, which should not be allowed to stand unanswered by this Court. First, the Circuit Court assumed that Congress has the right to allocate to the trial judge, rather than the jury, determinations of fact in criminal cases. Second, the decision holds that the failure of the trial court to submit a material issue of fact for jury determination can be regarded as non-prejudicial under the harmless error rule	9

PAGE

III. The prosecution of isolated conduct on the part of a legitimate businessman unconnected with racketeering represents a dangerous expansion of the Travel Act and offends basic concepts of federal-state relations. Moreover, in determining that petitioner was not entitled to acquittal even if the jury found the payment in fact were extorted by the public officer, the lower courts violated long-standing federal rules for the determination of applicable state law and erroneously applied as "preferable" federal policy a rule enunciated by a single circuit in connection with a federal statute having no anti-racketeering purpose 13

CONCLUSION 24

TABLE OF AUTHORITIES

Bruton v. *United States*, 391 U.S. 123 (1968) 12

Chapman v. *United States*, 386 U.S. 18 (1967) 12

Commonwealth v. *Bausewine*, 156 Pa. Super. 535 (1945) 18

Commonwealth v. *Exler*, 243 Pa. 155 (1914) 17

Commonwealth v. *Francis*, 201 Pa. Super. 313, *cert. denied*, 375 U.S. 985 (1964) 17

Commonwealth v. *Glover*, 397 Pa. 543 (1959) 17

Commonwealth v. *Hopkins*, 165 Pa. Super. 561 (1949) 17

Commonwealth v. *Kilgallen*, 379 Pa. 313 (1954) .. 17

Commonwealth v. *Masters of Lancaster, Inc.*, 199 Pa. Super. 36 (1962) 17

Commonwealth v. *Shook*, 211 Pa. Super. 413 (1967) 17

Commonwealth v. *Wilson*, 30 Pa. Super. 26 (1906) 18

Edwards v. *United States*, 330 U.S. 395 (1947) ... 11

PAGE

Hornstein v. *Paramount Pictures*, 292 N.Y. 468 (1944) 18

McNeese v. *Board of Education*, 373 U.S. 668 (1963) 16, 18
Mims v. *United States*, 375 F.2d 135 (5th Cir. 1967) 11

Nardello v. *United States*, 393 U.S. 286 (1969) ... 14

Osborne v. *United States*, 385 U.S. 323 (1966) 11

People v. *Dioguardi*, 8 N.Y. 2d 260 (1960) 18

Rewis v. *United States*, 401 U.S. 808 (1971) 14, 20

Sherman v. *United States*, 356 U.S. 369 (1958) 11

United States v. *Addonizio*, 451 F.2d 49 (3d Cir. 1971) 20
United States v. *Barash*, 412 F.2d 26 (2d Cir. 1969), *cert. denied*, 396 U.S. 872 (1969) 16, 21
United States v. *Bass*, 404 U.S. 336 (1972) 14
United States v. *Clizer*, 464 F.2d 121 (9th Cir. 1972) 7
United States v. *Enmons*, — U.S. —, 41 LW 4301, February 22, 1973 ..... 14, 20
United States v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965) 21
United States v. *Ruggiero*, — F.2d — (2d Cir., January 23, 1973) 7

Village of Brooten v. *Cudahy Packing Co.*, 291 F.2d 284 (8th Cir. 1961) 18, 19

West v. *American Telephone and Telegraph*, 311 U.S. 233 (1946) 16, 18

Yodel v. *Nu-Enamel*, 117 F.2d 488 (8th Cir. 1941) 17

Statutes

N.Y. Penal Law § 200.05 18
18 U.S.C. 201 ..... 3, 16, 21
18 U.S.C. 1621 ..... 2, 5, 6, 7, 8, 12
18 U.S.C. 1623 ..... 2, 5, 6, 7, 8, 9, 12
18 U.S.C. 1951 ..... 20, 21
18 U.S.C. 1952 ..... 1, 20, 21

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-

IRVING B. KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Irving B. Kahn, a defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit (Waterman, Smith and Kaufman, *J.J.*) on January 9, 1973, which affirmed a judgment of conviction entered after a trial before Motley, *J.*, and a jury in the United States District Court for the Southern District of New York for conspiracy and violation of the Travel Act, 18 U.S.C. 1952, and for perjury. Teleprompter Corporation, a defendant below, also has filed a petition with this Court.

Opinions Below

The opinion delivered in the Court of Appeals is not yet officially reported and is set forth in Appendix A (1a-34a). The opinions of the District Court are reported at 343 F.Supp. 1033 and 343 F.Supp. 1047 and are set forth in Appendices B and C (35a-64a).

Jurisdiction

The judgment of the Court of Appeals, dated and entered January 10, 1973, is set forth in Appendix D (65a).

The jurisdiction of this Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1254(1).

Questions Presented

I. Perjury

1. Did and could Congress intend that the prosecutor could pick and choose between 18 U.S.C. 1621 and 18 U.S.C. 1623 in prosecuting perjury before a federal court or grand jury?

2. Did and could Congress intend that the factual issues of the recantation defense newly provided by 18 U.S.C. 1623 be determined by the trial court rather than the jury?

3. Under *Chapman* v. *California* 386 U.S. 18 (1967), can an appellate court's "finding" as to the lack of factual merit in that defense be used under the Harmless Error Rule to cure violation of the defendant's constitutional right to trial by jury?

4. Was the refusal of the Trial Judge to instruct the jury that no perjury could be found in literally truthful answers a reversible error?

II. Travel Act

5. Does the Travel Act, a federal anti-racketeering statute, reach isolated conduct by an admittedly legitimate businessman on behalf of a public corporation which has no racketeering connection?

6. Does the Travel Act sanction the conviction of a businessman for bribery if a payment is extorted from the businessman by a public official's repeated threats to destroy his business?

7. Where a determination of state law is essential to whether a federal criminal statute such as the Travel Act has been violated, must a federal district court exhaust all available state law data, as is required in federal civil diversity cases, before turning to federal law?

8. Where the nexus of the acts alleged in a Travel Act prosecution involves two states—here Pennsylvania and New York—in substantially equal degree, and where the law of one state (Pennsylvania) is found to be unclear as to whether the conduct in question is criminal, are the lower courts bound by an express provision of the law of the other state (New York) that the conduct is not criminal?

9. Where the prosecution is for violation of the Travel Act, an anti-racketeering statute, is "preferable" federal policy to be determined by analysis of the Travel Act itself, and of other federal anti-racketeering statutes, or by reference to the more general federal bribery statute, 18 U.S.C. 201.

Statutory and Constitutional Provisions Involved

The following statutory and constitutional provisions are involved:—18 U.S.C. 1621, 18 U.S.C. 1623, 18 U.S.C. 1951, 18 U.S.C. 1952, N.Y. Penal Law 200.05, Article 3, § 2, Cl. 3, Amendment V, Amendment VI, Fed. R. Crim. P. 52(a) (66a-72a).

Statement of the Case

Petitioner Irving B. Kahn, a New York businessman and President of Teleprompter Corporation, caused $15,000 to be paid to the Mayor of Johnstown, Pennsylvania in 1966. Mr. Kahn's defense was that he paid the money not to secure any special advantage but only as a result of the Mayor's extortive threats to destroy Teleprompter's cable television franchise in Johnstown unless he did so.

Petitioner and Teleprompter in fact did not pay to get a *new* franchise. They already had invested more than $1,000,000 in the only franchise in Johnstown, which they had purchased in 1961 and which by late 1965 was generating almost 30% of Teleprompter's revenue.

In January 1966 however—as the Mayor confessed for the first time at the trial—a Johnstown crony offered the Mayor $20,000 of a $50,000 bribe if he could deliver Teleprompter's franchise to a local business group. The Mayor almost immediately ordered a public auction of Teleprompter's franchise. Petitioner fought against the public sale of his franchise and, failing in that, saved the franchise by offering the city $474,000, the highest bid. Although the Mayor, who had received no money at this time, still opposed Teleprompter, the City Council reawarded the franchise to Teleprompter.

The Mayor continued to fight Teleprompter and said publicly that its franchise still was in jeopardy despite the City Council's action. He summoned petitioner to Johnstown and, according to petitioner, threatened to "destroy Teleprompter in Johnstown" unless petitioner matched the bribe money which had been offered by the local business group in January. Petitioner said he therefore agreed to pay the Mayor $15,000. All of the money subsequently was paid in New York to either the Mayor's son or the Mayor, who traveled to New York to receive payment.

All of these facts were undisputed except that the Mayor denied any threats and said it was Mr. Kahn who originated the idea of a payment.

Mr. Kahn also was indicted for perjury during his original grand jury appearance, even though he later voluntarily recanted and made a second statement to the grand jury correcting the statements alleged to be perjurious. A new perjury statute, 18 U.S.C. 1623, became effective shortly before Mr. Kahn's first grand jury testimony and specifically makes recantation a defense. The perjury charge however was brought under the old perjury statute, 18 U.S.C. 1621, which does not recognize recantation as a defense.

Reasons for Granting a Writ

I. Perjury

I. The writ should be granted to settle important questions—including constitutional questions—arising out of the new perjury statute, 18 U.S.C. 1623. The first three cases to reach the Circuit Courts have produced a conflict on the question of whether 1623 is now the exclusive vehicle for prosecuting perjury before a grand jury, or whether the prosecutor has a right of election to proceed under either the new statute or under the old statute, 18 U.S.C. 1621.

18 U.S.C. 1623 changes the rules of perjury prosecution in two basic respects. The government's burden of proof is eased by elimination of the historic two-witness requirement. See 18 U.S.C. 1623(e). And, as specifically relevant to Mr. Kahn's case, recantation is established as a complete defense . . . "if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." 18 U.S.C. 1623(d).

The rules of perjury prosecution are markedly different depending upon which statute is applicable. Where 18 U.S.C. 1621 is the proper statute, two witnesses are required to convict but recantation is not a defense. Where 1623 is the proper statute, only one witness is required to convict, but recantation is a defense.

In the instant case the prosecution chose 1621 as the vehicle of prosecution and thereby avoided Mr. Kahn's recantation defense. We argued below that 1623 is now the only applicable statute. The Trial Court rejected this contention by ruling that the prosecution had the right to elect to proceed under either the old statute or the new statute.

There already exists a conflict in the Circuits on this point which this Court should resolve.

In *United States* v. *Clizer*, 464 F. 2d 121 (9th Cir. 1972) the Ninth Circuit held that 1623 is now the exclusive vehicle for prosecution of perjury before a grand jury. In *Clizer*, even though the government had elected to proceed under 1621, and the jury had been charged under the provisions of 1621, and had returned a verdict of guilty under 1621, the Circuit Court held on appeal that satisfaction of the two-witness rule under 1621 was unnecessary because 1623 is the only applicable statute.

In *United States* v. *Ruggiero*, —— F.2d —— (2d Cir. January 23, 1973), however, the Second Circuit held that the prosecution is entitled to choose between 1621 and 1623.

The legislative history supports our contention that Congress intended 1623 to supplant 1621 with regard to perjury before the courts or grand juries (73a-74a).

We believe that a contrary construction would be unconstitutional. To make the identical offense punishable under two separate statutes containing inconsistent standards of proof, different punishments, and different defenses, is so inherently unreasonable as to violate the requirement of due process. This is not a question of the same act constituting two different offenses, but a question of the identical offense being governed by two inconsistent statutes.

To allow the prosecutor to pick and choose between statutes governing the identical offense would allow him in many cases to predetermine guilt or innocence and would violate the requirements of equal protection of the laws.

Finally it must be recognized that the recantation defense was provided in 1623 in order to encourage truth telling and the correction of false testimony. It is repugnant to suppose that Congress intended to encourage truth telling by a promise of immunity under 1623, but intended to allow prosecutors to renege upon that promise by proceeding under 1621 and using the recantation as evidence of prior falsity. Even if one could believe that Congress might have had such a crafty intention, would it be constitutional to employ such tactics to induce admissions of criminal liability?

The choice of statute is critical in the instant case because Mr. Kahn gave a second statement to the grand jury which corrected the allegedly perjurious content of his earlier grand jury testimony and thus provided a basis for the defense of recantation recognized under the new statute. The Trial Court rejected defense motions based on the claim of the wrong statute, and also rejected a request made by defendant's attorneys for a jury instruction on the defense of recantation under the provisions of the new statute. This request was made to protect the record, even though the prosecution of the case under the old statute placed the issue of recantation outside the bounds of the pleadings and evidence, and thus prevented a complete development of the evidence surrounding the recantation. (Mr. Kahn's second grand jury statement was put into evidence by the *prosecution* as proof of perjury in the earlier statement.)

While Second Circuit expressed skepticism regarding the prosecution's claim that it could elect to proceed under either statute, it avoided a decision as to which

statute applied by "finding" that in any event Mr. Kahn's recantation defense had no *factual* merit. That "finding" must be rejected for constitutional reasons set forth in Point II, and thus the question of which statute applies cannot be avoided in this case.

II. The Circuit Court decision represents a double attack upon the right of trial by jury, which should not be allowed to stand unanswered by this Court. First, the Circuit Court assumed that Congress has the right to allocate to the trial judge, rather than the jury, determinations of fact in criminal cases. Second, the decision holds that the failure of the trial court to submit a material issue of fact for jury determination can be regarded as non-prejudicial under the harmless error rule.

The Second Circuit decision avoids a direct finding as to which statute applies by holding that in any event Mr. Kahn's recantation defense had no merit, because the recantation was made when " 'it had already become manifest that said falsity had or will become exposed.' " This decision necessarily assumes that under 1623 it is for the court to decide whether at the time of recantation it is manifest that the falsity has been or will be discovered—or, alternatively, that in this particular case, the facts were so clear that the Court had the right to summarily reject the defense. We respectfully submit that on either basis the decision contravenes the constitutional right to trial by jury.

Whether it is manifest that false swearing has been or will be exposed is a question of fact which must be determined upon the circumstances of each individual case. The Circuit Court sought to draw a conclusive inference from the fact that Mr. Kahn's recantation was made to the grand jury after the date on which other defendants had

accused Kahn of bribery. In reaching its conclusion the Court inferred, *sub silentio*, that the secret grand jury testimony somehow became known to Mr. Kahn. The Court also inferred that the date on which Kahn's statement was made to the grand jury was the date on which he made his admission of falsity. The Circuit Court failed to recognize that the defendant does not control the date on which he can appear before the grand jury, and that in the normal course he must first make his admissions to the U. S. Attorney.[1] The Circuit Court also failed to recognize that trial of the case under the old statute had prevented development of evidence surrounding the circumstances and timing of Mr. Kahn's recantation, and that it could not be proper to make findings of fact upon issues as to which the defendant had no trial or hearing. Thus the factual conclusion which the Circuit Court regarded as unavoidable was based on inferences and *a priori* assumptions of fact, bottomed on an erroneously restricted record.

But in a fundamental sense it does not matter whether the Circuit Court's findings are accepted as persuasive, or even if they are accepted as based on conclusive evidence. The heart of the matter is that there is no constitutional warrant for the Court to decide issues of fact in criminal cases no matter how conclusive the evidence may be regarded. The Court may never direct a verdict of guilty in a criminal case, and the failure to submit a material issue to the jury—no matter how conclusive the Court may deem the evidence—is regarded, *pro tanto*, as the direction of the verdict: *United Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U.S. 395, 408, 67 S. Ct.

[1] These considerations are not hypothetical (76a-78a).

775, 91 L. Ed. 973 (1947); *Edwards* v. *United States*, 286 F.2d 681 (5th Cir. 1960); *Mims* v. *United States*, 375 F.2d 135, 147-148 (5th Cir. 1967).

The Circuit Court believed that Congress intended that the court and not the jury should determine a recantation defense. It drew this conclusion from the statutory language providing that recantation shall be a "bar to prosecution." We respectfully disagree with the Court's conclusion as to congressional intent, but in any event we believe that no federal criminal statute can allocate to the court determinations of fact going to the general issue. It makes no difference whether the fact arises in the nexus of the prima facie case, or whether, as here, it arises out of a defense in the nature of confession and avoidance—fact issues must be determined by the jury. There is no doubt that the jury must determine such affirmative defenses as self defense and entrapment, *Sherman* v. *United States*, 356 U.S. 369 (1958); *Osborne* v. *United States*, 385 U.S. 323 (1966), and the defense of recantation is in the same category.

Superficially it might seem that if Congress could withhold the defense of recantation entirely, it could couple the grant of the defense with a condition that it be tried to the court, but this view cannot withstand analysis. Congress has broad discretion in defining crimes and defenses, but within the boundary of any such definition all facts must be triable by the jury, and Congress cannot legislate otherwise.

The Circuit Court's decision also relies upon a line of cases under the "Harmless Error Rule" to the effect that no prejudice results to the defendant merely from the fact that

he is prosecuted under the wrong statute. But in the instant case the Trial Court's reliance on the wrong statute prevented submission of the recantation defense to the jury, causing a prejudice which cannot be cured by any appellate finding as to the factual merits of the recantation defense. The Circuit Court's finding in the instant case that the defense of recantation was not "available" to Mr. Kahn is no more than a left handed finding of fact and thus is an usurpation of the province of the jury.

We believe that the right to trial by jury on factual issues in criminal cases is a fundamental constitutional right, denial of which can never be cured under the Harmless Error Rule. The precise point made by us has not been specifically decided by the Supreme Court, but we believe that the issue and the answer are implicit in the Court's following decisions. *Chapman* v. *California*, 386 U.S. 18 (1967); *Bruton* v. *United States*, 391 U.S. 123 (1968); *Harrington* v. *California*, 395 U.S. 250 (1969).

We think there is no doubt that the trial court would have submitted the defense of recantation to the jury if the prosecutor had selected 1623 as the vehicle of prosecution. This would have allowed the jury to decide the factual merit of the defense. This was denied Mr. Kahn when the trial court accepted the prosecution's argument that it had the right to pick 1621 in its discretion and conducted the trial on that basis.

Unless the prosecution actually has such a choice of statute, the trial court committed error which the Circuit Court stretched too far in an attempt to cure. As the Circuit Court's opinion now stands it represents a dangerous erosion of the right of trial by jury. The suggestion

that Congress could legislate away the right of trial by jury of a recantation defense is possibly even more dangerous than the idea that an Appellate Court can cure a failure to submit a defense to the jury by finding that the defense had insufficient factual merit, and thus was "unavailable to the defendant". Surprisingly little has been written by this Court, or even the lower courts, concerning the peripheral limits of the right to trial by jury: See dissenting opinion of Justice Black in *United States* v. *Gainey*, 380 U.S. 63, 77-78 (1965). We think these are compelling reasons to issue the Writ.

* * * * *

In light of *Bronston* v. *United States*, —— U.S. —— (1972), petitioner wishes to reserve Question 4, *supra*, p. 3, in the event the Writ is granted.

III. The prosecution of isolated conduct on the part of a legitimate businessman unconnected with racketeering represents a dangerous expansion of the Travel Act and offends basic concepts of federal-state relations. Moreover, in determining that petitioner was not entitled to acquittal even if the jury found the payment in fact were extorted by the public officer, the lower courts violated long-standing federal rules for the determination of applicable state law and erroneously applied as "preferable" federal policy a rule enunciated by a single circuit in connection with a federal statute having no anti-racketeering purpose.

1. This Court has never determined whether the Travel Act, which was specifically intended to deter racketeering activity only, may be employed to prosecute isolated conduct by a legitimate businessman having no connection with any racketeering enterprise or activity.

The need for such a determination is essential in view of the proliferating use of the Travel Act to reach and punish

non-racketeering conduct. If this conviction stands then any bribe of a state or local official is punishable under the Travel Act if phones or mail or any interstate facility is used. This raises questions basic to the concept of federalism, as this Court recognized in *Rewis* v. *United States*, 401 U.S. 808, 812 (1971):

> "In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could over-extend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies."

See also *United States* v. *Enmons*, —— U.S. ——, 41 LW 4301, February 22, 1973; *United States* v. *Bass*, 404 U.S. 336, 349 (1972).

In this very case, one of the Pennsylvania statutes which petitioner allegedly violated was a misdemeanor. See 18 Pa. Stat. § 4304.

After reviewing the legislative history, this Court twice has recognized that the Travel Act is aimed "at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." *Rewis* v. *United States*, *supra*, 401 U.S. at 811; *Nardello* v. *United States*, 393 U. S. 286 (1969).

Attorney General Kennedy, who sponsored the statute, described the statute's narrow purpose and scope as follows:

> "The target clearly is organized crime. . . . Obviously, we are not trying to curtail the sporadic,

> casual involvement in these offenses but rather a continuous course of conduct sufficient for it to be termed a business enterprise." Hearings before Senate Committee on the Judiciary, 87th Cong. 1st Sess. p. 16 (1961).

Assistant Attorney General Miller before the House Judiciary Committee:

> "H.R. 6572 bans unlawful businesses—not incidental illegal acts done in the course of lawful businesses. Since the bill in addition would require proof of the requisite intent before a violation could be made out, I believe that the scope of H.R. 5672 in no way threatens the activities or rights of any persons other than the organized criminals at whom it is aimed." (Hearings before House Committee on the Judiciary, 87th Cong. 1st Sess., 1961, p. 336.)

The Travel Act was not intended to substitute Federal authority for that of the state absent that type of sprawling organized crime activity which the states lack adequate resources to fight. Sound policy reasons suggest that isolated transactions like petitioner's should be left to state and local officials who are in the best position to determine what happened and who should be punished in the interest of the community most affected, and to the state courts which are in the best position to decide the legal merits of issues which, in a Travel Act prosecution, require an analysis and understanding of state law. In this very case, the local official received a suspended sentence and the businessman five years in jail, and the lower federal courts were unable to decide whether petitioner's conduct violated the law of Pennsylvania.

2. The basic legal question in this Travel Act case was whether a payment made as the result of extortion by a public official is a kind of conduct which is prohibited by the Travel Act. If not, the petitioner was entitled to a jury instruction that he should be acquitted of that charge if the jury believed him. This instruction was requested and refused (75a-76a). This error stemmed from the lower courts' confusion and uncertainty as to choice-of-law in a Travel Act case, which should be cleared up by this Court.

First of all, the lower courts turned away too soon from an examination of state law on the question. They looked first to the law of Pennsylvania, but ended that inquiry when it developed that "there [were] no Pennsylvania cases on point" (8a-9a). Instead of analyzing rather substantial Pennsylvania authority which bore on the issue, the lower courts made an *ad hoc* decision that the Second Circuit's decision in *United States* v. *Barash*, 412 F. 2d 26 (2nd Cir.), *cert. denied*, 396 U.S. 872 (1969), which interpreted the essentially unrelated federal bribery statute, 18 U.S.C. 201, represented "preferable" federal policy.

The approach of the lower courts violated their duty as federal courts, faced with a question of state law, to "ascertain from all the available data which the state law has and apply it * * * *. *West* v. *American Telephone and Telegraph*, 311 U.S. 233, 236-237 (1946). It is no matter that the Pennsylvania courts have never been faced with the precise issue and therefore have never decided it. Mere difficulty in predicting what a state court *would do* does not relieve a federal court of that burden. *McNeese* v. *Board of Education*, 373 U.S. 668, 673 n. 5 (1963). They must

make the prediction and, to do so, must examine and weigh "any convincing manifestations of local law, having a clear root in judicial conscience and responsibility whether resting in direct expressions or obvious implication and reference . . ." *Yodel* v. *Nu-Enamel*, 117 F. 2d 488, 489 (8th Cir. 1941).

The lower court ignored this obligation and gave no weight to substantial authority which compels the conclusion that a Pennsylvania court would recognize extortion as a defense to bribery in that state, especially under the constructional mandate of *Commonwealth* v. *Exler*, 243 Pa. 155, 162, 89 A. 968, 971 (1914):

> "[W]hen a criminal statute calls for construction, it is not the construction that is supported by the greater reason that is to prevail but that which, if reasonable, operates in favor of life and liberty."

See also 118 Pa. Stat. § 5104: *Commonwealth* v. *Shook*, 211 Pa. Super. 413, 235 A. 2d 559, (1968): *Commonwealth* v. *Masters of Lancaster, Inc.*, 199 Pa. Super. 36; 184 A. 2d 347 (1962); *Commonwealth* v. *Glover*, 397 Pa. 543, 156 A. 2d 114 (1959).

The Pennsylvania courts have said that bribery and extortion are mutually exclusive crimes. *Commonwealth* v. *Francis*, 201 Pa. Super. 313, 191 A. 2d 884 (1963). They have reasoned that a victim of a public official's extortion cannot be his accomplice. *Commonwealth* v. *Hopkins*, 165 Pa. Super. 183, 171 A. 2d 561 (1961), *rev'd on other grounds*, 407 Pa. 1: 79 A. 2d 360 (1962). They also have held that bribery requires both a giver and a taker and that "[e]ach is the accomplice of the other." *Commonwealth* v. *Kilgallen*, 379 Pa. 315, 108 A. 2d 708

(1954). Certainly if an extortion victim cannot be the accomplice of the extortioner and if bribery requires a giver and a taker, both of whom are accomplices, it follows logically that the victim of an extortion cannot be convicted of bribery. *See e.g., Commonwealth* v. *Wilson*, 30 Pa. Super. 26 (1906). Finally, the Pennsylvania courts have insisted that Pennsylvania bribery statutes are to be strictly construed. *Commonwealth* v. *Bausewine*, 156 Pa. Super. 535, 40 A. 2d 919 (1945), *rev'd on other grounds*, 345 Pa. 35, 46 A 2d 491.

For these reasons it is predictable that a Pennsylvania court, faced with the precise issue, would decide it in petitioner's favor. By refusing to go further than a determination that there was no precise determination under existing Pennsylvania law, the lower courts committed fundamental error. *McNeese* v. *Board of Education*, 373 U.S. 668, 673, n. 5 (1963); *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 236-237 (1946); *Village of Brooten* v. *Cudahy Packing Co.*, 291 F. 2d 284 (8th Cir. 1961) (Blackmun, J.).

3. Any doubt as to the law of Pennsylvania should have been resolved in petitioner's favor in any event by reference to the law of New York which clearly exempts an extortion victim from the charge of bribery. N.Y. Penal Law 200.05; *Hornstein* v. *Paramount Pictures*, 292 N.Y. 468 (1944); *People* v. *Dioguardi*, 8 N.Y. 2d 260 (1960).

Under the Travel Act no behavior is punishable unless it is "in violation of the laws of the state in which committed". In the instant case the state "in which committed" was clearly—if ungrammatically—Pennsylvania *and* New York. Most of the money was paid in New York. The

Mayor of Johnstown travelled to New York, just as Mr. Kahn travelled to Pennsylvania. Interstate telephone conversations ran both ways. Teleprompter's main office was in New York and Mr. Kahn is a New York citizen. Thus the nexus of the instant case involves the State of New York to the same extent as the State of Pennsylvania.

If the policy of Pennsylvania is unclear, that of New York is crystal clear. Under New York law a citizen who yields to extortion of public officials cannot be convicted of bribery. In New York this is not merely judge made law, but an express statutory provision designed to recognize the realities of life. New York State as a matter of public policy seeks to avoid any possibility that a citizen shaken down by officials who misuse governmental powers shall be further injured by government through a bribery prosecution as a result of being so victimized.

In reaching this policy the legislators of New York decided that the need to protect the citizen was more important than the deterrent effect of a rule that would leave an extorted business man open to a bribery charge. In the instant case, the District Court and the Circuit Court adopted precisely the opposite policy.

We suggest that the legislative intent of the Travel Act—namely to respect the policies of the respective states—requires that if the law of one state is unclear, and the law of the other state involved in the act is absolutely clear, the law of the second state must be binding in the case. See *Village of Brooten* v. *Cudahy Packing Co.*, 291 F. 2d 284 (8th Cir. 1961) (Blackmun, J.). We believe this

to be a question of first impression which should be settled by this Court. This conclusion is especially valid in Travel Act prosecutions where, almost by definition, the allegedly criminal conduct invariably takes place in *more* than one state.

This approach to the question of applicable state law also would give genuine substance to the principle referred to in *Rewis* v. *United States*, *supra*, 401 U.S. at 812, where this Court said, in reversing another Travel Act conviction because the conduct involved was not within its statutory reach:

> "In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of Section 1952. And even if this lack of support were less apparent *ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity*. . . ." (Emphasis added)

See also *United States* v. *Enmons*, *supra*, 41 LW at 4306.

4. Denial below of Kahn's contention that extortion is a defense to a charge of bribery under Section 1952 was also inconsistent with those cases which have interpreted and administered its sister federal statute, 18 U.S.C. 1951, which also was intended to deter racketeering. The cases decided under that statute make it clear that even *lesser* economic threats (*existing* property rights *not* involved) constitute extortion on the part of the public official and that the businessman payor in such circumstances is a victim and not a criminal. See e.g., *United States* v. *Addonizio*, 451 F. 2d (3rd Cir. 1971). The application of the Travel Act to a case like petitioner's therefore results in the prosecution of the very class of persons which its sister statute, 18 U.S.C. 1951, was intended to protect.

In this respect it is clear also that a defendant charged with extortion in violation of 18 U.S.C. 1951 is allowed to defend on the ground that the payment was voluntary and therefore was a bribe and not extorted. See e.g., *United States* v. *Kubacki*, 237 F. Sup. 638 (E.D. Pa. 1965). See also Advisory Committee's Notes, 18 U.S.C. 1951. It would be most incongruous to allow bribery as a defense to extortion under 18 U.S.C. 1951 while rejecting extortion as a defense to bribery under the Travel Act.

5. Thus the Courts below by-passed the proper sources of law on the question of extortion as a defense under 18 U.S.C. 1952. They failed to determine Pennsylvania law; they refused to follow New York law; and they overlooked analogous cases under 18 U.S.C. 1951, a sister statute of the Racketeering Chapter of the Criminal Code. Instead, they choose the least appropriate source of law, namely the rule in *United States* v. *Barash*, 412 F. 2d 25 (2nd Cir. 1969), which arose under 18 U.S.C. 201, the statute applicable to bribery of federal officials and employees, a context having no connection with racketeering or federal-state relations.

Further the Circuit Court overlooked that the instruction given in this case went beyond the *Barash* instruction, *Id.*, 412 F.2d at 30, and went beyond the instruction in any case we know of, in telling the jury that if it finds that there was extortionate pressure, and even if it finds that Kahn paid the money *because of such pressure*, then the jury could still convict Kahn. The precise language of the instruction given by the Trial Court was as follows (75a) (emphasis added):

> "Tompkins and Deardorff denied having conducted themselves in this fashion. Whether they did or

did not so conduct themselves is an issue of fact for you, the jury. But if you find that there was such pressure by Tompkins and Deardorff, and *if you find that thereafter Kahn paid money because of such pressure*, then you may consider the conduct of Tompkins and Deardorff as bearing on the issue whether Kahn, in making such payment or payments, had the requisite intent to influence action of a public official, which is an essential element of the offense of bribery under Pennsylvania law, as I have already described to you."

We believe that no prior case, including *Barash*, contained an instruction that the defendant could be found guilty even though the jury found that he paid because of extortionate pressure. Under the *Barash* instruction the jury was told that if it found that extortionate pressure was put on the defendant it could take that fact into account in considering whether he made that payment with the requisite criminal intent. A fair reading of the *Barash* instruction is this:—If the jury finds extortionate conduct then it should consider whether in fact that conduct *caused* the payment to be made. The implication of the Barash charge was that a finding of such causality would exonerate the defendant.

The defendant is charged right into jail by an instruction that a payment made because of extortionate pressure is still corrupt if made to affect official action. By definition, the victim of extortion pays the official to avoid official action which will unlawfully injure him. Why else would a citizen make such a payment, unless the official happens to be his nephew or son-in-law?

We believe that if a jury finds the defendant paid because of extortionate official pressure, the defendant must be found to be not guilty of bribery. The procrustean policy adopted by the Circuit Court—let him call the police—is harsh, and unrealistic. Corroborative proof of the shake down is not usually available to the victim. It is his word against the official's. The police may be deaf, or worse. Often the official malefactors have strong and secret allies. It is bad enough that we cannot always protect our citizens from corrupt officials—certainly the law should not make them criminals because they have been victimized. We have never said that a jury was obliged to acquit Mr. Kahn, but only that the jury should not have been deprived of that opportunity by an instruction that said Mr. Kahn was guilty if he paid the money, regardless of *why* he paid the money.

* * * * *

Petitioner respectfully adopts Teleprompter's question with regard to the grand jury selection. See Teleprompter's Petition.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: New York, New York
March 1, 1973

Respectfully submitted,

RALPH WIENSHIENK
10 East 40th Street
New York, New York
212-679-3260

PHILIP MANDEL,
PETER E. FLEMING, JR.
JOHN E. SPRIZZO
BERNARD ROTHMAN
Of Counsel

APPENDIX A

Opinion in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 119, 120—September Term, 1972.

(Argued October 18, 1972 Decided January 9, 1973.)

Docket Nos. 71-2205-6, 72-1776-7

UNITED STATES OF AMERICA,

Appellee,

v.

IRVING B. KAHN and TELEPROMPTER CORPORATION,

Appellants.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction and sentences entered after a jury trial in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, of Irving B. Kahn and Teleprompter Corporation for conspiracy and violation of the Travel Act, 18 U.S.C. §1952, of Kahn also for perjury, and from denial of motion for a new trial.

Affirmed.

PETER FLEMING, JR., New York, N.Y. (Curtis, Mallet-Prevost, Colt & Mosle, New York, N.Y., John E. Sprizzo and Martin J. Proscia) and Philip Mandel, New York, N.Y., of counsel, *for Appellant Kahn.*

ROBERT B. FISKE, JR., New York, N.Y. (Davis, Polk & Wardwell, New York, N.Y., Dale L. Matschullat and Alan M. Dershowitz, of counsel), *for Appellant Teleprompter Corp.*

JOHN W. NIELDS, Asst. U.S. Attorney, (Silvio J. Mallo, Acting U.S. Attorney for the Southern District of New York, John D. Gordan, III, Asst. U.S. Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

This case takes us into the corrupt municipal politics of Johnstown, Pennsylvania, where local franchises were apparently granted to the highest bidder—of the biggest bribe to local officials. In 1966, Irving B. Kahn, on behalf of Teleprompter Corporation, made such a payment to three Johnstown officials to insure the retention of a local cable television franchise. The plot was later uncovered, and prosecution ensued. After a jury trial in the Southern District of New York, Constance Baker Motley, *Judge,* Kahn and Teleprompter were convicted of conspiracy and violation of the Travel Act, 18 U.S.C. §1952; Kahn was also convicted of perjury arising out of related grand jury pro-

ceedings. A motion for new trial was denied. Aided by able counsel, both appellants have now launched massive appeals. Nonetheless, we find no error and affirm.

I. The Facts

The background facts are not seriously in dispute. Appellants admit that the payment, totaling $15,000, was made to the three Johnstown officials, and that they paid the money to retain the TV franchise. In defense, they claim that the payment was the result of extortion, threats by the local politicians to destroy Teleprompter's valuable franchise.

The key characters to the drama can be quickly identified. Kahn was the president, founder, and chairman of the board of Teleprompter, which had operated a cable TV franchise in Johnstown since 1961. Kenneth O. Tompkins was the mayor of Johnstown; J. Howard Deardorff and Robert McKee were members of the City Council, who together with Tompkins, comprised a majority of that body.

Tompkins was elected in 1963, on a platform that included promises to increase local revenues from cable TV. In April, 1965, the City Council passed an ordinance, authorizing the granting of "non-exclusive licenses" for the operation of cable television franchises in return for payments to the city of about $12,000 a year. Teleprompter, which until then had been paying $600 annually for what to all intents and purposes was an exclusive license, became understandably upset, and initiated court action to void the ordinance as unconstitutional. Negotiations fol-

lowed, and the parties apparently settled upon an arrangement that would require Teleprompter to make annual payments to the city, beginning at $7500 and increasing to $12,000, in return for an exclusive franchise. This agreement was submitted to the City Council on December 14, 1965, and set down for consideration at the next weekly meeting.

A vote on the Teleprompter agreement never came. On December 21, representatives of four companies appeared at the meeting, and offered to bid on the TV franchise. On December 28, the representative of a fifth firm did likewise. At least two of the companies publicized their offers, which were on the surface considerably more generous than the proposed Teleprompter agreement.[1] On January 18, 1966, the Council announced that bids would be taken for the franchise, which would then be awarded at the February 1 meeting.

Kahn came quickly to Johnstown to fight the proposed bidding. On January 24, he met in his room at the Holiday Inn with Tompkins, Deardorff and McKee. According to Tompkins and Deardorff's trial testimony, Kahn originally tried to argue the three out of going through with the proposed bidding, but finally offered each a $5000 bribe if they would vote for Teleprompter on February 1. All agreed.

On the following day, Kahn appeared before the Council, and maintaining his previous public posture, argued stren-

[1] Trans Video Company of Barnesboro, Pa., offered $421,620 over twenty years, and the Johnstown Traction Company offered $450,000 over twenty years or 4% of gross receipts, whichever was higher.

uously against the proposed bidding. He spent several more days in Johnstown, continuing his public lobbying efforts.

Nevertheless, the bidding went forward. Teleprompter did not formally "bid", but did make an "offer" of $474,000 for a twenty-year exclusive franchise.[2] That bid was accepted by the Council on February 1, subject to further negotiations about specific conditions. Other bids were formally rejected on February 8; after intermediate negotiations between Teleprompter and the city, the franchise was finally awarded on March 2.

In the meantime, on February 26, Kenneth O. Tompkins II, the mayor's son, went to New York City and picked up a $7500 check from Teleprompter's public relations firm. He deposited the check, installment number one of the bribe, in a New York bank, drew two checks, and mailed them to his father, who distributed the proceeds. The next installment came in August, 1966, when the mayor himself went to New York, and collected $6000 from Teleprompter for a fictitious office machine that had allegedly been sold to the local TV franchise by Tompkins' office supply company. The same ploy was used to mask the final $1500 payment, in October, 1966, which was mailed directly to Tompkins' office.

On October 28, 1970, the younger Tompkins received a subpoena to testify before a grand jury in the Southern District. On November 6, he appeared, and falsely testified that the first $7500 check was in return for survey work he had done for Teleprompter. On November 25,

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[2] This stance was apparently taken to protect Teleprompter's litigation posture that the bidding procedure was unconstitutional.

the mayor appeared before the grand jury, and invoked the Fifth Amendment. Deardorff followed suit on December 16. On December 17, Kahn appeared for the first time and testified. He denied the payment of any bribes, and described the survey work allegedly done by the younger Tompkins.

In the next several weeks, the city officials apparently decided to make a clean breast of things. The mayor reappeared on December 22 and Deardorff on December 29, and both testified about the bribes. McKee again declined to testify on December 22, but on December 29 relented and also testified about the bribes. Finally, on January 27, Kahn reappeared, and read a prepared statement, admitting the payments but claiming that they were extorted.

Indictments followed, charging Kahn, Tompkins, Deardorff, McKee and Teleprompter with conspiracy and violation of the Travel Act, and charging Kahn with perjury. Tompkins and Deardorff pleaded guilty to conspiracy and testified for the government at the ensuing trials. McKee's case was severed, and he was convicted[3] after a trial before Judge Motley subsequent to that of Kahn and Teleprompter. The conviction was affirmed here. *United States* v. *McKee*, 462 F.2d 275 (2d Cir. 1972).

II. The Extortion Defense

As noted above, while admitting the $15,000 payments, Kahn and Teleprompter claimed that the money had been extorted from them. The factual outlines of the defense, presented chiefly through Kahn's grand jury testimony,

[3] McKee was acquitted with regard to one Travel Act count.

were as follows. The January 24 meeting at the Holiday Inn was a wholly innocent one, devoted wholly to legitimate lobbying against the proposed bidding. Realizing the apparent futility of its lobbying efforts, Teleprompter decided to make an offer the Council couldn't refuse, and the $474,000 bid followed. The size of the bid caught the mayor and Council off guard, and they were forced to accept it. But this angered the corrupt officials, who had planned to award the franchise to another bidder. Thus, the officials took advantage of the time period after February 1, ostensibly devoted to detailed negotiations, to threaten withdrawal of Council approval unless Teleprompter agreed to a "payoff." These threats, which went to the very economic survival of Teleprompter in the cable TV line, finally overwhelmed Kahn on February 10, and he reluctantly succumbed to the nefarious scheme.

Since appellants fully presented this defense to the jury below, which through its verdict of guilty rejected it, our obligation to view the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), would ordinarily require us to do the same. But, Kahn and Teleprompter claim that Judge Motley's instructions on the extortion defense prevented the jury from fairly considering the issue. It is to those contentions we now turn.

The Travel Act, 18 U.S.C. §1952, makes it a crime to use an interstate facility with intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," including bribery in violation of state law. Just as the initial inquiry in a Travel Act case is whether the underlying

activity violates a state law, *see United States* v. *Nardello*, 393 U.S. 286 (1969), the assertion of a particular state law defense in such a case requires a determination of whether the relevant state recognizes the defense. *United States* v. *D'Amato*, 436 F.2d 52, 58 (3rd Cir. 1970).

In the case at hand, appellants claim that Judge Motley erred by not instructing the jury that the defendants should be acquitted if it were found that they paid the money in response to extortion, or put briefly, that proof of extortion was a complete defense to bribery. Instead, the trial court told the jury that extortionate conduct by the public officials, if proved, could be considered by them in connection with the issue of whether the defendants had the requisite criminal intent and willfulness to violate the law. Since the Travel Act counts here were premised on a violation of several Pennsylvania bribery statutes,[4] the relevant

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[4] The Pennsylvania statutes which Kahn and Teleprompter were charged with violating were as follows:

18 Pa. Stat. § 4303:

"Whoever shall . . . give or make any promise for the payment . . . of any money . . . in order to obtain or influence the vote, opinion, verdict, award, judgment, decree, or behavior of . . . any officer . . . of this Commonwealth or of any political subdivision thereof . . . in any . . . matter or thing whatsoever, depending or which shall depend before him or them, is guilty of bribery."

18 Pa. Stat. § 4304:

"Whoever . . . by offer or promise of money . . . endeavors to influence any . . . municipal or other public officer in the discharge, performance or non-performance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation."

53 Pa. Stat. § 35911:

"Any person who shall . . . give or promise . . . any money . . . to any member of council or other city officer . . . to influence him in the performance or nonperformance of any of his public or official duties shall be guilty of bribery."

question is whether Pennsylvania law recognizes extortion as a complete defense to bribery, or whether such a defense is relevant only on the issues of intent and willfulness.

Unfortunately, there are no Pennsylvania cases on point, and such dicta as exist are inconclusive.[5] Appellants admit this absence of state law, but rely heavily on *United States v. Corallo*, 413 F.2d 1306 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), where this Court held "wholly unexceptionable" jury instructions which characterized extortion as a complete defense to bribery. *Id.* at 1323. However, the *Corallo* Travel Act prosecution was premised on an underlying violation of New York law, and New York Penal Law §200.05 (McKinney 1967) explicitly makes proof of extortion a complete defense to bribery. The Pennsylvania bribery statutes contain no such provision, and we think it would be anomalous to read into the Pennsylvania code a

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[5] Appellants cite such cases as *Commonwealth* v. *Francis*, 201 Pa. Super. 313, 191 A.2d 884 (1963), *cert. denied*, 375 U.S. 985, (1964), where it was stated that "it is generally held that" bribery and extortion are "mutually exclusive crimes." 191 A.2d at 889. In return, the goverenment cites *Commonwealth* v. *Bardascino*, 210 Pa. Super. 202, 232 A.2d 236 (1967), where a magistrate and court clerk were convicted of both bribery and extortion in connection with demanding and receiving $100 in setting a low bail for a defendant. In *Bardascino*, the appellants were held entitled to an accomplice charge with respect to the testimony of the payor, since, but for immunity, he could have been convicted of bribery. 232 A.2d at 242. The government argues, rather convincingly, that if extortion were a complete defense, the payor could not be convicted of bribery, in view of the previsous extortion convictions of the magistrate and clerk.

While the government thus probably has the better of the dicta, we are reluctant to rely heavily upon these cases, where the basic issue was not even raised, and where the statements were made in contexts far different from the one at hand.

provision that the New York legislature thought required a separate and explicit section in its state law.

At least two other considerations support this conclusion. In federal prosecutions under 18 U.S.C. §201, this court has refused to follow the New York rule of calling extortion a complete defense to bribery, but has instead held that such proof is relevant as bearing on the issue of intent. *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966) (*Barash I*). There appears no reason to reach a different result with respect to Pennsylvania law, which, like §201, is conspicuously silent on the subject.

Finally, as a policy matter, we think that the *Barash I* rule is the preferable one. Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by "dirty money," if not nonexistent, are at least exceedingly rare. The proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff. Thus, unless the extortion is so overpowering as to negate criminal intent or willfulness, we would be loath to allow those who give in to the illegal coercion to claim it as a total defense to bribery charges.

For all these reasons, we agree with Judge Motley that the Pennsylvania courts would not recognize proof of extortion as a complete defense to bribery charges, but would find the defense relevant only on the issues of intent and willfulness. Perhaps foreseeing this result, appellants claim that, even recognizing the validity of the general *Barash I* principle, Judge Motley's instructions on the extortion defense were erroneous.

At the outset, it is clear that Judge Motley's instructions virtually mirrored those approved by this court in *United States* v. *Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969) (*Barash II*). Kahn and Teleprompter, however, point to two instances where the charge deviated, albeit slightly, from *Barash II*, and claim prejudicial error.

First, appellants object to that portion of the charge where Judge Motley told the jury that bribery is committed where "the paying party intended that the official be influenced in some way." They claim that the correct instruction would be that the defendant must have intended to influence the official in *public* actions, and since a bribe by definition is designed to influence "in some way," this charge amounted to a directed verdict of conviction.

Whatever the technical merits of appellants' reasoning, it is inapplicable here. The objected language here occurred but two sentences after the point where the jury was told that bribery required the intent to influence a "public officer with respect *to any official act.*" (Emphasis added). Following so closely on such an instruction, the objected language hardly constituted prejudicial error. Indeed, on the facts of this case, it is difficult to see how the jury could have been affected at all by the challenged instruction. It was undisputed that the money was paid to secure the franchise, and awarding of the franchise was surely an official act.

Appellants' second objection to the charge is similarly meritless. In explaining the extortion defense, Judge Motley told the jury that economic coercion was relevant to the issue of whether the defendants "had the requisite in-

tent to influence action of a public official." Again, the claim is that the correct charge should have been "official action." But in the factual context of this case, where nothing but official action was at issue, and given the earlier instruction about bribery requiring the intent to influence an officer "with respect to any official act," there was clearly no error. Looking at the charge as a whole, *Barash II*, *supra*, 412 F.2d at 30, we find that Judge Motley fairly and completely presented the extortion defense to the jury, which clearly rejected it.

III. Rulings on the Evidence

Kahn (but not Teleprompter) has attacked five specific evidentiary rulings by Judge Motley. In each instance, he claims that the ruling unfairly restricted him in presenting his basic extortion defense. We find no error in the rulings, either individually or collectively.

A. *Evidence that Tompkins was corrupt.*

Judge Motley excluded an offer of proof that Kahn claims would have established Tompkins' "habitual corruption." The proof would have shown that one Cornelius, now deceased, had made collections from billiard parlors, card games, and local clubs, in order that these activities might remain in business. The proof would have shown that Cornelius' driver picked him up at City Hall daily, drove him on his rounds, and always dropped him off at City Hall. Kahn claims that this conduct is traceable to the mayor, and buttresses his extortion defense.

Judge Motley's exclusion of the proof was an appropriate exercise of her discretion. First of all, there was no clear link between Cornelius' alleged conduct and Tompkins. Moreover, the offer presented the very real danger of degenerating into a side trial, both to determine whether the "collections" actually occurred, and to determine whether the mayor was behind this activity. Much as Kahn would have preferred that this trial be one of Tompkins, not himself, the proffered evidence seems clearly collateral and of doubtful probative value.

Recognizing the dangers of confusing the jury with collateral issues, we have recently emphasized the general rule that prior misconduct of a witness not resulting in a conviction is inadmissible as direct proof. *United States* v. *DeSapio*, 456 F.2d 644, 648 n. 1 (2d Cir. 1972); *United States* v. *Glasser*, 443 F.2d 994, 1003 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). That rule has particular relevance here, where the misconduct is not clearly linked to the relevant witness. Under the circumstances of this case, Judge Motley did not err in excluding this evidence.[6]

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[6] *United States* v. *Bowe*, 360 F.2d 1 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966), upon which Kahn heavily relies, is not to the contrary. It is true that Judge Moore in *Bowe* recognized that evidence of a police agent's past entrapment activities was relevant to a defendant's claim that the officer caused him to commit a crime he otherwise would not have. But Judge Moore went on to note that exclusion of the evidence in that particular case was not error, in view of the limited probative value of the evidence and the very real danger that the jury would be misled into a "trial within a trial." 360 F.2d at 15-16. Thus, the *Bowe* court recognized that a trial judge has broad discretion in deciding whether to admit such evidence, after balancing the damages of its introduction against its probative value. *Cf. United States* v. *Costello*, 221 F.2d 668, 674 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956). Judge Motley correctly exercised such discretion in the case at hand.

B. Evidence Relating to Trans Video Company and All State Systems.

At the December 21 and 28, 1965 meetings of the Johnstown City Council, representatives of five concerns announced that they were interested in bidding. Two of these prospective bidders were not named at the meetings; the other three were Trans Video Company of Barnesboro, Pa., All State Cable Company of Ridgeway and Doylestown, Pa., and Johnstown Traction Company.

At trial, Kahn offered to show that neither All State nor Trans Video had a telephone listed under those names during 1965-67; and that All State did not operate a cable system in Doylestown.[7] Judge Motley excluded the evidence. Kahn now argues that the proof would have demonstrated that these two bidders did not exist, and that they were part of Tompkins' plot to extort money from Teleprompter.

We find no error in Judge Motley's ruling. Even assuming *arguendo* that failure of a company to have a phone number under its precise corporate name is probative of nonexistence, the other premises do not follow. First of all, there was no evidence to link this alleged sham up to Tompkins, who stated on the stand that he knew nothing of these two firms before the date of the bidding. Second, when the time for actual bidding, February 1, 1966, did arrive, each of the three companies made formal bids—Johnstown Traction's accompanied by a bid bond and All State's by a $10,000 check. In addition, C.A.T.V. Corpora-

[7] The offer did not indicate that All State did not operate a system in Ridgeway.

tion of Pittsburgh submitted a formal bid. Finally, Kahn makes no claim that Johnstown Traction or the Pittsburgh firm did not exist. The possibility of the mayor's use of phony firms to blackmail Teleprompter is greatly lessened, if not negated, by the actual submission of bids by these firms and by the involvement of admittedly genuine corporations in the entire process.

In short, the evidence was not truly probative on the extortion issue, and even if probative, was clearly collateral. The trial court quite properly exercised its discretion in excluding it. *See generally* C. McCormick, Evidence §152 at 319-20 (1954); *United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966).

C. Limiting Cross-examination of Deardorff.

On direct examination and on cross-examination by Kahn, Deardorff testified about the January 24, 1966 meeting at the Holiday Inn. During further cross-examination by Teleprompter, Deardorff said that he could not recall whether any bids were in before that January 24 meeting. Counsel for Teleprompter attempted to pursue the issue, but Judge Motley cut him off: "He says he doesn't recall. . . . Proceed."

Kahn then attempted to pursue this line on recross. Judge Motley, consistent with her previous ruling, refused to allow the questioning. Kahn now claims that had he been allowed to proceed, Deardorff would have admitted that the bids were in fact in at the time of the meeting, which would have shown that the rendezvous took place after February 1. This, in turn, would have buttressed Kahn's claim that the payments were not promised until February 10.

It is a basic principle that a trial judge has extensive discretion in controlling the scope and length of cross-examination. See, e.g., *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Dorfman*, —— F.2d —— (2d Cir., Nov. 29, 1972). The basic rule would seem to apply with special force to recross, especially after a full and searching cross-examination. *Cf. Turner* v. *United States*, 441 F.2d 786 (5th Cir. 1971). Here, there was clearly no abuse of Judge Motley's discretion. Kahn's argument is based on the sheer conjecture that, given recross, Deardorff would have broken down and changed his story. While we doubt that such speculation can ever justify extended recross, the evidence in this case makes such a course particularly inappropriate. Deardorff testified that the meeting took place at the Holiday Inn, and both Tompkins and Kahn, not to mention the motel records, put the date of this encounter at January 24. Moreover, Deardorff testified that he promised Kahn his vote at the meeting, and that Kahn had tried to "cancel the bidding." Neither of those statements is consistent with a meeting after February 1, when the bidding had occurred and the votes were in.

D. *Exclusion of a Statement Claimed to Have Been Made by Tompkins.*

As part of the defense, Paul Malinowsky, a Johnstown City Councilman, testified. Part of his testimony would have been that the mayor had said several weeks earlier, "I'll tell you one thing, if I am going to go down, everybody is going to go down with me." Judge Motley excluded that statement as an attempt to impeach a witness through collateral matters.

Kahn, citing cases that hold that bias is never a collateral matter, *e.g.*, *United States* v. *Haggett*, 438 F.2d 396 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971), claims that the statement exposed Tompkins as vindictive, and showed his clear motive to lie on the stand. But, at least on its face, the excluded statement is not convincing evidence of bias. The more likely reading of the words, as the government suggests, is simply that Tompkins, once exposed, was going to make a full disclosure and make sure that his co-conspirators did not escape their just desserts. Given the ambiguous nature of the proffered statement, its exclusion was not error.

Moreover, we note that Tompkins was never confronted with the statement on cross-examination. Professor Wigmore has suggested that the same reasons of fairness that require that a witness be given an opportunity to explain away a prior inconsistent statement also apply when the utterance is claimed to show bias, Wigmore, Evidence §953 (Chadbourne rev. 1970), and a number of courts have agreed. *Smith* v. *United States*, 283 F.2d 16, 20-21 (6th Cir. 1960), *cert. denied*, 365 U.S. 847; *United States* v. *White*, 225 F. Supp. 514, 519-21 (D.D.C. 1963), *rev'd on other grounds*, 349 F.2d 965 (D.C. Cir. 1965). We noted our approval of this rule in *United States* v. *Hayutin*, 398 F.2d 944, 953 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), and we reiterate that approval today. While we hold that exclusion of the statement under any event was not reversible error, the proper course should have been to confront Tompkins with it on cross-examination, to allow him to explain or deny it. Such a procedure is especially desirable in a case like this, where the utterance is ambiguous on its face, and where confrontation may aid in interpretation.

E. *Judge Motley's Refusal to Give an Advisory Ruling On the Scope of the Government's Cross-examination of Kahn.*

Prior to the beginning of the trial, the government indicated that it hoped to offer evidence with respect to a payment of $50,000 in 1968 by Teleprompter to city officials in Trenton, New Jersey. Judge Motley ruled that the prejudicial effect of such evidence would outweigh its probative value, and she excluded it. She refused, however, to give an advance ruling about whether this evidence could be used in cross-examination if Kahn took the stand, saying that in some cases it might be proper.

Kahn never took the stand. He now claims that Judge Motley's refusal to rule out cross-examination on the point was error, and that it was this ruling that prevented him from testifying in his own defense.

While we have made it clear that a trial judge has the power to give an advance ruling on the permissible scope of cross-examination, *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), it is also clear that such "highly discretionary adjudications" will not be reversed "unless the wisdom of so doing is very clear." *Id.* at 274; *Brooke* v. *United States*, 385 F.2d 279, 286 (D.C. Cir. 1967). We have explicitly refused to turn the Palumbo rule of discretion into one of compulsion, and have indeed emphasized that the trial court's power to limit cross-examination is often best exercised after hearing the direct testimony of the witnesses. *United States* v. *Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Crisona*, 416 F.2d 107, 117 (2d Cir. 1969), *cert. denied*,

397 U.S. 961 (1970); *United States* v. *Cacchillo*, 416 F.2d 231, 234 (2d Cir. 1969). Judge Motley's actions here clearly fall far short of constituting an abuse of discretion.

III. The Perjury Count

Kahn has mounted a four-pronged attack against his perjury conviction. He claims (1) that he was prosecuted under the wrong statute; (2) that without regard to the proper statute, Judge Motley erred in her jury instructions concerning recantation; (3) that the trial court erred in allowing the jury to consider his January 27, 1971 grand jury testimony as evidence of the falsity of his original December 17, 1970 testimony; and (4) that Judge Motley erred in instructing the jury about what constitutes perjury.

Kahn was indicted under 18 U.S.C. §1621, the general perjury statute. However, on October 15, 1970, Congress enacted Pub. L. 91-452, the Organized Crime Control Act of 1970. *Inter alia*, that Act added §1623 to Title 18. That section, applicable only to false declarations made in court proceedings or before grand juries, does away with the ancient "two-witness" evidentiary rule in perjury cases, and provides:

> "(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission was made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has or will be exposed."

Kahn now cites cases such as *Kepner* v. *United States*, 195 U.S. 100, 125 (1904); *Shelton* v. *United States*, 165 F.2d 241, 244 (D.C. Cir. 1947); and *United States* v. *Wechsler*, 158 F. 579, 581 (2d Cir. 1907), for the proposition that a statute aimed at specific conduct prevails over an otherwise applicable general statute. Just as *Shelton* and *Wechsler* found perjury prosecutions improperly brought under the general statute when special perjury statutes were available, Kahn would have us find that he should have been prosecuted under §1623, not §1621. And, he claims, had the prosecution been under §1623, his January 27 "recantation" would have barred perjury prosecution.

In response, the government claims that §1623 did not repeal §1621, and that the prosecutor has the absolute discretion to choose which section an alleged perjurer will be tried under, and consequently, what evidentiary rules will apply to his trial. While it is clear that §1623, which applies only to grand jury and court proceedings, did not wholly replace §1621, which covers oaths before any "competent tribunal, officer, or person," we admit great skepticism about the second half of the government's argument. While perhaps Congress constitutionally could have placed such wide discretion in the prosecutor, we find no clear indication that it meant to do so here.[8] And, we find not a little

[8] The legislative history cited by both sides is inconclusive. The government refers to comments by the Justice Department, incorporated in S. Rep. 91-617, 91st Cong., 2d Sess. 109 (1969), that §1623 is "an additional felony provision" which is intended to "supplement, not supplant existing perjury provisions"; and to comments by an A.B.A. representative that §1623 "is not an amendment of the present perjury statute but . . . a new addition." Hearings on S. 30 before Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 264

disturbing the prospect of the government employing §1621 whenever a recantation exists, and §1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position.

However, we need not reach the merits of the government's position in the case before us. Even assuming *arguendo* that the indictment named the wrong statute, there was no prejudice to Kahn. The substantive elements of perjury are the same under either statute, and since the trial court applied the "two-witness" rule, Kahn got at least his due, if not more, on the evidence. Kahn's only serious claim is that §1623(d) entitled him to a complete recantation defense. But at the time of Kahn's January 27 grand jury testimony, Tompkins, Deardorff, and McKee had all testified to the bribes that Kahn had falsely denied on December 17. We find, as did Judge Motley, that on January 27 it had already "become manifest that such falsity has or will become exposed," so that, by its own

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(1969). But such comments can be explained by the fact of §1623's limited reach; even if §1623 were the exclusive vehicle for prosecutions of perjury before courts and grand juries, §1621 would still be needed to reach false declarations before administrative tribunals and others, and hence would not be supplanted or amended by the new section.

Conversely, Kahn's reliance upon a statement by a Justice Department representative that §1621 covers proceedings that §1623 does not, Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. 637 (1970), hardly shows that §1623 is the sole vehicle for prosecuting perjury committed before courts and grand juries. Even if the government's argument about both sections being available here were correct, §1621 would extend to administrative proceedings, which §1623 clearly does not.

terms, a §1623(d) defense was not available to Kahn.[9] And, absent the availability of such a defense, there was no prejudice here even if the government named the wrong statute. *United States* v. *Clizer*, 464 F.2d 121, 124-25 (9th Cir. 1972). *See also, United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941); *United States* v. *Nixon*, 235 U.S. 231, 235 (1914); *Williams* v. *United States*, 168 U.S. 382, 389 (1897); *United States* v. *Calabro*, 467 F.2d 973, 981 (2d Cir. 1972); *United States* v. *Galgano*, 281 F.2d 908, 910-11 (2d Cir. 1960), *cert. denied*, 366 U.S. 960 (1961); *United States* v. *McKnight*, 253 F.2d 817, 820 (2d Cir. 1958); Fed. R. Crim. P. 7(c).

Kahn next claims that Judge Motley erred in instructing the jury about his January 27 "recantation." He requested a charge that recantation is "potent evidence to negative a wilful intent to swear falsely," citing *Beckanstin* v. *United States*, 232 F.2d 1, 4 (5th Cir. 1956). Instead Judge Motley told the jury that "recantation or retraction is relevant only in showing an absence of intent to commit perjury. It does not excuse the initial perjury."

Beckanstin, upon which Kahn relies, is readily distinguishable from the case at hand. In *Beckanstin*, the defendant, when asked what school he had graduated from, responded, "Massachusetts Institute of Technology." In fact, he had merely attended the school, and corrected his testimony as soon as he realized the mistake. In revers-

[9] Moreover, since §1623(d) says that an admission of the falsity of the prior declaration "shall *bar prosecution*," (emphasis added) it would seem that the defense should be raised prior to trial, and disposed of then by the judge. Here, the issue was not raised until just before the charge to the jury, in a motion for a judgment of acquittal.

ing a perjury conviction, the Fifth Circuit not only felt that the misstatement was not material, but that all the circumstances showed no intent to deceive. It was within this context, where the appellate court ruled that the perjury indictment never should have gone to the jury, that the "potent" language appears.

There were no such exigent circumstances here, and there was ample evidence to go to the jury on perjury. Judge Motley's instructions represented an accurate characterization of the law, and we find no error in her giving them. *See United States* v. *Norris*, 300 U.S. 564, 576 (1937); *United States* v. *Lococo*, 450 F.2d 1196, 1198 n. 2 (9th Cir. 1971). *Cf. United States* v. *Hirsch*, 136 F.2d 976, 977 n. 1 (2d Cir.), *cert. denied*, 320 U.S. 759 (1943).

Kahn next contends that his January 27 grand jury testimony could not have been used by the jury to decide the falsity of his December 17 testimony, and that Judge Motley erred by instructing to the contrary. But in *United States* v. *Goldberg*, 290 F.2d 729, 733-35 (2d Cir.), *cert. denied*, 368 U.S. 899 (1961) and *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965), we held that extrajudicial statements which contradict a defendant's sworn testimony were admissible to prove perjury.[10] The same result would seem to apply *a fortiori* to prior judicial tes-

[10] The narrow question in *Goldberg* and *Marchisio* was whether the statement could be used, in addition to independent corroborative evidence of perjury, to satisfy the "two-witness" rule, which had been designed to prevent convictions based upon an "oath against an oath." We held in both cases that the independent evidence in effect served as the first witness, so that prior statements might take the role of the second one. In the case at hand, there is no claim that, apart from the January 27 testimony, there was not sufficient independent proof of perjury to satisfy the two-witness rule.

timony, which is certainly no less of an admission than extra-judicial utterances and can invariably be put in evidence through the use of certified transcripts, thus avoiding difficulties inherent in witnesses' recollection. The use of the January 27 testimony here was proper.[11]

Finally, Kahn claims that Judge Motley erred in failing to instruct the jury that a "literally truthful" answer could not constitute perjury. Instead, she merely told the jury that to constitute perjury, a statement had to be false.

We find no error in those instructions. Neither the majority opinion nor the dissent in *United States* v. *Bronston*, 453 F.2d 555 (2d Cir. 1971), *cert. granted*, 405 U.S. 1064 (1972), suggests a different result. Both Judge Oakes' panel opinion and Judge Lumbard's dissent recognized in *Bronston* that the defendant's actual response to the question put was indisputably true.[12] The opinions part company on the issue of whether an acquittal should have been granted *as a matter of law*, or whether the false implication and evasiveness in the answer justified leaving the issue of perjury to the jury. Here, Kahn's answers *themselves* surely could have been found false by the jury; indeed, it would have been surprising if they had not so

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[11] Indeed, if we accept Kahn's view and characterize this prosecution as one under the new perjury statute, §1623(c) explicitly makes the prior inconsistent testimony admissible.

[12] The defendant in *Bronston* responded to a question about whether he had a Swiss bank account with the answer "The Company had an account there for about six months, in Zurich." It was undisputed that the company did have such an account; the majority and the dissent take issue on whether a perjury conviction would be sustained on the ground that the answer constituted a lie by negative implication, i.e., that Bronston himself did not have such an account.

found.[13] There was overwhelming evidence of perjury in the record, and the jury would have been remiss in reaching any other conclusion.

IV. The Applicability of the Travel Act

Kahn next claims that since the transactions in question here were "isolated" and had no connection with a comprehensive scheme of interstate racketeering, application of the Travel Act, 18 U.S.C. §1952, was improper. He relies chiefly upon *Rewis* v. *United States*, 401 U.S. 808 (1971), and two of its progeny, *United States* v. *Altobella*, 442 F.2d 310 (7th Cir. 1971), and *United States* v. *McCormick*, 442 F.2d 316 (7th Cir. 1971).

None of those cases calls for reversal of the Travel Act convictions here. In *Rewis*, the Supreme Court held that neither the language nor the legislative history of the Travel Act showed that Congress intended the statute to apply to a purely local gambling operation just because some of its *customers* crossed state lines. *Altobella* reached a similar result in a case where the only use of interstate

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[13] For example, the indictment includes this colloquy among its assignments of perjury:

> "Q. Isn't it a fact that really what happened here is, you agreed to give Mayor Tompkins, $7500, and the best way it could be disguised was camouflage this fee by the payment to George Daley and Kenneth Tompkins, Jr., which went back to his father?
>
> A. It's not a fact, absolutely not.
>
> Q. Would it surprise you to learn that the $7500 that you paid Kenneth Tompkins, Jr., went to his father?
>
> A. It would."

While Kahn was surely entitled to argue to the jury that he was in fact surprised, *we* would have been surprised had they agreed.

facilities resulted from the fact that an extortion victim cashed a check on an out-of-state bank to pay off the defendants. Similarly, in *McCormick* the only ostensible interstate facet of the crime, running an illegal Indiana lottery, occurred when a local newspaper in which the defendant had advertised for some salesmen mailed some of its copies out of state.

The common thread through each of these decisions is that the defendants themselves engaged in no interstate activities, and that the total interstate travel aspect of the enterprises was either marginal or unforeseen. Indeed, the *Rewis* court left open the question of whether proof of active solicitation of an interstate clientele might come within the Act, and cited with explicit approval cases where the statute was applied to individuals whose agents or employees crossed state lines in furtherance of an illegal activity. 401 U.S. at 813, 814. And, in *United States* v. *Lee*, 448 F.2d 604, 606-7 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971), the Seventh Circuit found *Rewis* and *Altobella* inapplicable where the interstate travel was that of a member, rather than a victim, of the illegal enterprise.

The case at hand shows a knowing and intentional use of interstate commerce not only by various members of the conspiracy, but also by Kahn himself. Kahn went from New York to Johnstown and agreed upon the illegal payments; Kahn arranged for one check to be mailed from New York to Pennsylvania; the mayor and his son came up from Johnstown to New York on two separate occasions to collect payoff checks from Kahn and Teleprompter. Such activities, far from representing the unforeseen and marginal use of interstate facilities present in *Rewis* and its progeny, constituted conduct central to the illegal enter-

prise performed by partners to the crime. The Travel Act was correctly applied. *Cf. United States* v. *Levine*, 457 F.2d 1186, 1188-89 (10th Cir. 1972).

V. The Composition of the Grand Jury

Both at the trial court and on appeal, Teleprompter and Kahn have mounted a massive attack upon the composition of the grand jury that returned the indictment. The challenge is basically three-pronged: (1) that the Southern District Plan for Random Jury Selection, which mandates the use of voter registration lists as the source of names of those who sit on grand juries, is unconstitutional because it results in underrepresentation of those between the ages of about 24 and 30 because they tend to register in fewer numbers than older voters; (2) that since the grand jury plan at the time of the indictment excluded all 18-20 year olds, they were denied equal protection;[14] and (3) that the refilling of the grand jury master wheel every four years conflicts with the Federal Jury Selection and Service Act, 28 U.S.C. §1861 *et seq.*

The first two contentions are foreclosed by the thoughtful opinion of Judge Hays in *United States* v. *Guzman*, —— F.2d —— (2d Cir., Nov. 8, 1972), which carefully considered and rejected identical claims. We see no reason to add to what was said in that decision here.

As to the third claim,[15] it finds its basis in the language of 28 U.S.C. §1869(c), which defines "voter lists" as those

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[14] By an amendment on April 6, 1972, 28 U.S.C. §1865(g)(1) now provides that 18 years of age is the minimum age for grand and petit jury service. Pub. L. 92-269; 86 Stat. 117.

[15] This contention was considered, and rejected, by the district court in *Guzman*, 337 F. Supp. 140, 145 (S.D.N.Y. 1972), but was not raised on appeal. —— F.2d at —— n. 4.

from "either the most recent State or the most recent Federal general election." Teleprompter and Kahn contend that this provision reflects a requirement by Congress that the master jury wheel be refilled every two years. They point to a passage in H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Adm. News 1792, 1806-7, stating that the statute insures "that the list used will in any event not be more than 2 years old," as supporting this view.

At the time of the indictment here, 18 U.S.C. §1863(b)(4) only required that a jury selection plan "provide for periodic emptying and refilling of the master jury wheel at specified times." Surely if Congress intended that the wheel be refilled every two years, it could have found a more direct way of saying so.[16] Indeed, H.R. Rep. No. 1076 makes it clear that this provision was adopted to avoid court clerks' objections to previous drafts, which had required refilling of the master wheel at "specific times." 1968 U.S. Code Cong. & Adm. News at 1800.

We find that the Southern District Plan's requirement of refilling every four years did not conflict with the Act. *Accord, United States* v. *Kuhn*, 441 F.2d 179 (5th Cir. 1971). Such an interpretation is wholly consistent with the language relied upon by appellants in the House Report. The entire sentence in which the "two year" language appears reads as follows: "Accordingly, while the two subsections [1869(c) and (d)] permit the plan to choose between State and Federal lists, they also insure

[16] In fact, Congress on April 6, 1972 amended §1863(b)(4) to provide for refilling every four years. Pub. L. 92-269; 86 Stat. 117.

that the list used will in any event be not more than 2 years old." This passage, when read in conjunction with the other provisions of the statute, appears to say that when a new list is *chosen*, that new list itself must be less than 2 years old. Thus, while the time of refilling is left to the districts, the maximum permissible age of the list used is not.

VI. The New Trial Motions

As noted previously, McKee was tried subsequently to Kahn and Teleprompter. Relying on several pieces of testimony from that trial, appellants made a motion for a new trial based on newly discovered evidence to Judge Motley. She denied the motion; Kahn and Teleprompter assign that denial as error.

The general standard governing motions for a new trial on the grounds of newly discovered evidence is familiar. The evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict in the event of a retrial. *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir. 1972); *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). The function of a court of appeals in reviewing a denial of an ordinary new trial motion is a limited one; the motion is directed to the trial court's discretion and factual determinations may not be set aside on review unless "wholly unsupported by evidence." *United States* v. *Johnson*, 327 U.S. 106, 111-12 (1946); *United States* v. *Silverman*, 430 F.2d 106, 119-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

However, the strict standards of the general rule are relaxed where the newly discovered evidence was known to the government at the time of trial, but not disclosed. If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972); *Brady* v. *Maryland*, 373 U.S. 83 (1963). The same rule applies, even in the absence of intentional suppression, if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention. *Polisi*, *supra*, 416 F.2d at 577; *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968). In each of these instances, the materiality of the evidence to the defendant is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict. *Polisi*, *supra*; *United States* v. *Bonanno*, 430 F.2d 1060, 1063 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145-47 (1964).

If the government's nondisclosure is merely inadvertent, and does not involve evidence whose high value to the defense could not have escaped notice, however, a somewhat stronger burden is put on the defendant. While the movant is still not required to show the probability of a different verdict upon retrial, setting aside a conviction is only called for when there is "a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969); *United States* v. *Mayersohn*, 452 F.2d 521, 526 (2d Cir. 1971).

Appellants here cite two pieces of evidence presented at the McKee trial that were admittedly known to the government at the time of their trial. As to each of these, they claim that the high value to the defense could not have escaped the prosecutor's notice, and thus that a new trial is warranted because of materiality.

The first piece of testimony cited is that of Warren Reitz, one of the principals in the Johnstown Traction Company. He testified at McKee's trial that on February 1, 1966, just before the bids were opened, McKee told him, "Warren, this isn't the way to do this, you should have seen me before." Kahn and Teleprompter now claim that this shows that the bribe had not yet been made, and buttresses their claim that it was not until February 10, following Tompkins' extortion, that they caved in.

The claim is frivolous. The remark would seem to prove just the opposite—that submitting a bid on February 1 was useless, since Teleprompter had already assured itself of the contract with its January 24 bribe. Not only is it impossible for us to conclude that the value of this evidence could not have escaped the government's notice, we doubt whether it is at all material or favorable to the defense. And it goes virtually without saying that we see no significant chance, under the more demanding *Miller* standard, that development of this item would have avoided a conviction.

The second piece of newly discovered evidence was based upon a memorandum of an interview by the government with McKee in June, 1971. That memorandum, used by the government in cross-examining McKee at his trial,

apparently disclosed[17] that McKee had large amounts of cash in his possession; $10,000 in a safe deposit box and $5000 at home.

Appellants argue that this evidence would have established McKee's corruption, and that its value as part of the extortion defense could not have escaped the government. Again, we disagree and see no error in the denial of the new trial motion. First, it requires several giant steps of conjecture to get from the existence of these cash hoards to McKee's participation in systematic extortion.[18] Second, even if the evidence is assumed *arguendo* to be probative of McKee's corruption, it is difficult to see what use the defense could have made of it here. Only Tompkins and Deardorff testified for the government at the Teleprompter-Kahn trial; this evidence could hardly have been used to impeach them, since it involves McKee and does not amount to a conviction. And, even leaving aside the doubtful proposition of whether such evidence could be used to impeach McKee himself,[19] it is simply fanciful on appellants' part to suggest that McKee would have been called to testify had they known about the cash hoards. McKee was, at the time of the Teleprompter-Kahn proceedings, awaiting his own trial; there is not a shred of evidence to suggest that he would have waived the Fifth Amendment to take the stand here. Indeed, appel-

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[17] Appellants have apparently never seen the memorandum; they base their claims as to its contents upon the substance of McKee's cross-examination.

[18] Indeed, since the cash was in McKee's possession as late as 1971, at least $5000 of it may have come from the episode in question here.

[19] Since the evidence does not amount to a criminal conviction, it would ordinarily be inadmissible to impeach the credibility of a witness. *See* the discussion in Part IIIA, *supra*.

lants offer only conjecture as to how this evidence could have been used at all, even in trial preparation. Under any standard of review, Kahn and Teleprompter were not entitled to a new trial on this ground.

The final three pieces of newly discovered evidence involve alleged inconsistencies between the testimony of the city officials at the two trials. No claim is made that these "inconsistencies" were known to the government at the time of the first trial,[20] so the strictest standard of review applies—would the evidence probably produce a different verdict upon retrial?

The first of these claims is based upon Tompkins' testimony at the McKee trial, where he testified that he had asked Kahn to make the payment in cash or stock. At the Kahn-Teleprompter trial, the mayor had denied asking for cash. As Judge Motley found, this evidence at most is impeaching; it seems only to raise a minor question about how the bribe was requested to be paid. There is clearly no real probability that use of this inconsistent statement on cross-examination of Tompkins would have led to a different result in the Kahn-Teleprompter trial, and there was no abuse of discretion in denying the new trial motion on this ground.

Next, appellants claim that Deardorff changed his testimony about what occurred at the Holiday Inn. They claim that while Deardorff testified at the first trial that Kahn had gone into the bathroom with all three officials and

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[20] Appellants do suggest that since they have no proof that the government knew of this evidence at the time of the first trial, the proper course would be to remand for an evidentiary hearing where they might be able to establish the point. "We see no reason to provide this relief and no precedent for it." *DeSapio, supra,* 456 F.2d at 652.

made the offer, he testified at McKee's trial that the subject was broached with him first, and then taken up with the group. Judge Motley doubted that there was any real inconsistency between the two pieces of testimony at all, and we see no reason to quarrel with that conclusion. Indeed, even if Deardorff did change his story on this ground at the McKee trial, the "newly discovered evidence" here hardly meets the strict standard necessary to set aside a jury verdict.

Finally, appellants claim that Deardorff changed his testimony at the McKee trial about whether he talked about the case with other city officials before the trial. Again, even assuming that inconsistencies in the testimony do exist, the evidence would hardly have changed the verdict at the first trial. Considered collectively or individually, the pieces of newly discovered evidence did not warrant a new trial, and Judge Motley did not err in so ruling.

VII. Conclusion

We have carefully considered appellants' other claims, including Kahn's contentions of prosecutorial misconduct and Teleprompter's argument that the admission of the December 17 grand jury testimony against the corporation was error, and we find no merit in them.[21] The judgments of conviction are affirmed.

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[21] Citing *Northern Oil Co.* v. *Socony Mobil Oil Co.*, 347 F.2d 81 (2d Cir. 1965), Teleprompter claims that before an employee's testimony can be attributed to the corporation, there must be a strict showing of specific authorization. However, *Northern Oil* is clearly distinguishable from the case at hand. There, the contested testimony was that of a temporary assistant to a district sales manager; here, Kahn was president, founder, chairman of the board, and a major stockholder of Teleprompter. In this context, the claim that his testimony was not admissible against the corporation is absurd.

APPENDIX B

Opinion of the District Court

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. HOWARD DEARDORFF, *et al.*,

Defendants.

No. 71 Cr. 111.

UNITED STATES DISTRICT COURT,
S. D. NEW YORK.
Oct. 27, 1971.

WHITNEY NORTH SEYMOUR, JR., U. S. Atty., by Andrew Maloney and John D. Gordon, III, Asst. U. S. Attys., New York City, *for plaintiff.*

DAVIS, POLK & WARDWELL by Robert B. Fiske, Jr., Curtis, Mallet-Prevost, Colt & Mosle by Peter Fleming, Jr., New York City, *for defendants.*

MOTLEY, *District Judge.*

Appendix B—Opinion of the District Court

Memorandum Opinion on Defense of Extortion and Discovery of FBI Files

I.

Defendants are charged in Counts One through Four of a five-count indictment with violating 18 U.S.C. § 1952, the Travel Act, by using the facilities of interstate commerce with intent to promote the commission of the offense of bribery, in violation of the laws of Pennsylvania, and thereafter carrying out that intent, and with conspiring to do the same.[1]

Defendant Kahn, as President and Chairman of the Board of Teleprompter Corporation, is alleged to have traveled to Johnstown, Pennsylvania, with the intent to offer a bribe to his codefendants, the Mayor of Johnstown and two city councilmen, and to have paid the bribe through the mails, in order to induce the Mayor and councilmen to grant a Johnstown cable television franchise to Teleprompter. The defense of defendants Kahn and Teleprompter is that the money in question was extorted from them by the Mayor and councilmen.

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[1] 18 U.S.C. § 1952 provides, in part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to— . . . (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs . . . any of the acts specified in [subparagraph] . . . (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means . . . (2) . . . bribery . . . in violation of the laws of the State in which committed. . . .

Defendants' theory is as follows. Where an offense is charged under 18 U.S.C. § 1952, under the subdivision making it a federal crime to use interstate facilities with intent to promote the commission of bribery in violation of *state* law,[2] the laws of that state determine what defenses defendants may raise to the "state offense element" of the federal crime. That is, if defendants have a defense under the laws of Pennsylvania to the "bribery under state law" element of the federal offense they cannot be held to have violated the Travel Act. Defendants contend that according to the laws of Pennsylvania extortion is a complete defense to bribery.

In pursuing their theory, Kahn and Teleprompter caused a subpoena duces tecum to be issued for all material in the files of the Pittsburgh, Pennsylvania office of the Federal Bureau of Investigation (which includes Johnstown within its jurisdiction) pertaining to all defendants. Their aim was to obtain evidence of a pattern of "shakedown" activity on the part of Tompkins from which it could be inferred that Tompkins had shaken down Kahn and Teleprompter. This evidence is said to be a key element in defendants Kahn and Teleprompter's defense that Mayor Tompkins and the city councilmen extorted the money in question.[3] They claim that under state law their codefendants alleged extortion of funds from them negates any intent to bribe in violation of state law on the part of Kahn and Teleprompter.

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[2] See 18 U.S.C. § 1952(b) (2) quoted in fn. 1.

[3] Despite the admitted importance of the questions raised by the subpoena duces tecum to defendants' defense they have submitted no memorandum on the issues involved.

The government opposed the discovery of any of the FBI material by defendants. It contended that, to its knowledge, the files contain no information relating to "shakedown" activity by Tompkins. Even if the files were found to contain such material, the government stated that it would oppose allowing defendants to inspect and use it on "policy grounds."[4] Also, it was the government's belief that evidence of "shakedown" activity by Tompkins in other contexts than the one in issue in this case would be inadmissible because such evidence would introduce too many collateral issues into the trial. The government maintained further that even if extortion could be proved in the situation involved in this case, it would not be a complete defense to bribery but would only go to the issue of Kahn and Teleprompter's wilfulness and intent.

The court ruled from the bench on the underlying question of the relevance of extortion by the alleged recipient of a bribe to a charge under subdivision (b) (2) of the Travel Act,[5] and on what evidence relating to extortionate activity by Tompkins and Deardorff would be admissible. The court stated that defendants had made no showing that extortion is a complete defense to bribery under Pennsylvania law,[6] but that whether defendants were victims of a shakedown would be relevant to the issue of defendants Kahn and Teleprompter's wilfulness and intent in paying the $15,000, these being elements of the crime of bribery that must be established by the government beyond a rea-

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[4] The government elaborated on the reason for this, saying that if FBI files could be obtained by the defense for any prospective government witness, witnesses would be inhibited from testifying.

[5] See fn. 1.

[6] Defendants cite no Pennsylvania cases directly on this point.

sonable doubt. Thus, evidence of "shakedown" activity by Tompkins in the specific situation in issue in this case would be admissible on the elements of wilfulness and intent.

After an *in camera* inspection of the FBI material, the court ruled that under the above analysis none of it was relevant to any issue in the present case.[7]

II.

The subdivision of the Travel Act whose violation is charged in the instant indictment makes the violation of state law an element of the federal offense. It has been held that state rules of practice and procedure are not binding on federal courts when applying this subdivision of the Travel Act, United States v. Corallo, 413 F.2d 1306, 1323 (2d Cir. 1969), and that state labels for particular offenses, or narrow interpretations of state statutes, will not restrict federal courts in applying it, United States v. Nardello, 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969);[8] see United States v. Kubacki, 237 F.Supp. 638, 643 (E.D.Pa.1965). However, United States v. D'Amato, 436 F.2d 52 (3d Cir. 1970), the case on the Travel Act most closely in point,

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[7] The court further ruled that there was no material obtainable by the defense under the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in the FBI files produced. The material was sealed by the court for transmittal to the Second Circuit Court of Appeals in the event of an appeal by defendants.

[8] In *Nardello,* extortion was the state offense charged under the Travel Act. According to the laws of Pennsylvania, the state in issue, extortion could only be committed by a public official, whereas the same act committed by a private individual was a violation of the state blackmail statute. The Travel Act refers to extortion and bribery as the only state offenses whose commission is within its purview. The Supreme Court held that the federal courts need not be bound by "peculiar versions of state terminology," 393 U.S. at 293-295, 89 S.Ct. 534, so long as state law prohibited the type of conduct in question.

hold that state defenses are available to a defendant charged with violation of the Travel Act, through violation of a state statute, on the state law elements of the federal offense.

Where state law is uncertain on a particular question, federal courts have the right to interpret state law in applying the Travel Act.

> . . . [I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Meredith v. Winter Haven, 320 U.S. 228, 234, 64 S.Ct. 7, 11, 88 L.Ed. 9 (1943).

In *Winter Haven* the Supreme Court stated that it had never hesitated:

> . . . to decide questions of state law when necessary for disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might give remained uncertain. 320 U.S. at 237, 64 S.Ct. at 12.

D'Amato held that:

> This power to decide state-law questions is not limited to cases brought under the Federal court's diversity jurisdiction. In cases brought by virtue of their involvement with Federal questions, the court is not limited to the Federal questions but will decide all of the issues in the case including state-law questions. (citation omitted) 436 F.2d at 54.

See also United States v. Wechsler, 392 F.2d 344 (4th Cir. 1968), 408 F.2d 1184 (4th Cir. 1969) (en banc, per curiam), cert. denied, 392 U.S. 932, 88 S.Ct. 2283, 20

L.Ed.2d 1389 (1969);[9] United States v. Keresty, 323 F.Supp. 230 (W.D.Pa.1971).

Pennsylvania law is, at best, vague on the question of whether extortion is a complete defense to bribery. There are no cases directly on that point, although several cases indicate that the circumstances surrounding the giving of a bribe are considered to be relevant on the issue of the intent of the person giving the bribe. Commonwealth v. Francis, 201 Pa.Super. 313, 191 A.2d 884, 890 (1963); Commonwealth v. Friedman, 193 Pa.Super. 640, 165 A.2d 678, 681 (1960); Commonwealth v. Wilson, 30 Pa.Super. 26, 29-30 (1909).

This court finds that, under Pennsylvania law, extortionate activity on the part of the recipient of a bribe, in connection with the particular bribe charged, is revelant and admissible on the issue of the intent of the person offering the bribe, but is not a complete defense as insanity or duress would be. This would appear to be the rule under federal law as well. See United States v. Barash, 365 F.2d 395, 401-402, 403 (2d Cir. 1966), and cases cited therein.

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[9] In *Wecksler*, the Court interpreted the Virginia bribery statute to determine when the act of bribery could be considered to be completed under state law.

APPENDIX C

Opinion of the District Court

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. HOWARD DEARDORFF, *et al.*,

Defendants.

No. 71 Cr. 111.

UNITED STATES DISTRICT COURT,
S. D. NEW YORK.
Oct. 5, 1971.

WHITNEY NORTH SEYMOUR, JR., U. S. Atty., by Robert G. Morvillo and D. Gordon III, New York City, for plaintiff.

DAVIS, POLK & WARDWELL by Robt. Fiske, Jr., Curtis, Mallet-Prevost, Colt & Mosle, by Peter Fleming, Jr., Shea, Gallop, Climenko & Gould, New York City, Alan M. Dershowitz, Cambridge, Mass., for defendants Kahn and Teleprompter.

MOTLEY, *District Judge.*

Appendix C—Opinion of the District Court

I. Statement of Facts

A two count indictment was filed against defendants on January 28, 1971. The first count charges defendants with conspiring to violate 18 U.S.C. § 1952 (the Travel Act) by agreeing to use an interstate facility to intentionally promote, manage, establish or carry on or facilitate the promotion, management, establishment or carrying on of the unlawful activity of bribery. The second count alleges, as a substantive violation of 18 U.S.C. § 1952, that the defendants used interstate facilities to intentionally promote, manage, establish or carry on, the unlawful activity of bribery in violation of the Penal Code of the State of Pennsylvania, or facilitate the promotion, management, establishment or carrying on of such activities.

The Government alleges the following account. On January 18, 1966 defendant Kenneth O. Tompkins, then the mayor of Johnstown, Pennsylvania, and defendants Robert McKee and J. Howard Deardorff, then city councilmen of Johnstown, caused the approval of an ordinance to permit sealed competitive bidding for a cable television franchise in Johnstown. Six days later, on January 24, Irving Kahn, president of Teleprompter, travelled from New York to Johnstown to meet with those three city officials. At the meeting Kahn, Tompkins, McKee and Deardorff agreed that Teleprompter would pay the three Johnstown officials a $15,000 bribe if they would vote in favor of awarding the cable television franchise to Johnstown Cable TV, a subsidiary of Teleprompter.

At the February 1, 1966 meeting of the committee of the whole of the Johnstown City Council, Tompkins, McKee

and Deardorff voted to reject all bids on cable television submitted by Teleprompter's competitors.

At a general session of the City Council on February 8, Tompkins made a motion to arrange a meeting with officers of Teleprompter to discuss terms for a cable television franchise. Deardorff seconded the motion, and all three defendant officials voted for it.

Finally, at the March 2 general session of the Johnstown City Council, these three defendants voted for Ordinance No. 3678, which granted Johnstown Cable TV a ten-year exclusive cable television franchise with an option to renew for ten years.

Meanwhile, on February 25, 1966 Kahn and Teleprompter transmitted $7,000 to defendant Tompkins in Johnstown. Tompkins, in turn, gave McKee and Deardorff each $2,000 sometime in March. On August 26, 1966 Kahn and Teleprompter sent Tompkins another payment, this time of $6,035.61. A third payment of $1,464.39 was made to Tompkins by Kahn and Teleprompter on October 20. Tompkins again gave McKee and Deardorff $2,000 each soon after receiving the last installment from Kahn and Teleprompter.

The Government alleges, in sum, that Kahn sent Tompkins a total of $14,500.00, of which Tompkins gave McKee and Deardorff $4,000 apiece. In return, it is charged, the three defendants used their official positions to provide Teleprompter's subsidiary with the exclusive Johnstown cable television franchise.

Defendants have made a variety of pre-trial motions. They move to dismiss the indictment on the ground that their alleged conduct does not violate federal law, and on

the ground that the grand jury was improperly selected. They also move to dismiss the conspiracy count. They further move for a bill of particulars and for discovery and inspection. There is also a motion for an order directing the government to ascertain and disclose the fruit of any monitoring it has conducted.

II. Motion to Dismiss the Indictment Because the Alleged Conduct Does Not Violate Federal Law

There can be no doubt that the alleged activities of defendants fall within the literal terms of the statute. The relevant part of 18 U.S.C. § 1952, including its title, reads as follows:

> "Interstate and foreign travel or transportation in aid of racketeering enterprises.
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

> (b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Defendants are charged with carrying on unlawful activity in violation of Section 1952(a) (3). The unlawful activity with which they are charged is defined in subsection (b) (2) as ". . . bribery . . . in violation of the laws of the State in which committed or of the United States." The phrase "business enterprise" used in defining unlawful activity in subsection (1) of § 1952(b) is not used in subsection (2) delineating bribery as an unlawful activity. Read literally, therefore, the statute does not require that bribery in violation of § 1952 be connected with a criminal business enterprise. The indictment thus clearly alleges facts bringing defendants within the terms of the statute.

Defendants contend, however, that bribery must be connected with, or in aid of, a racketeering enterprise to violate § 1952. In support of this interpretation they point to the language of the title of § 1952, the section's legislative history, and its recent interpretation in Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). For the reasons which follow, the court rejects defendants' interpretation of § 1952 and finds their alleged conduct within its terms.

The title of § 1952, as reproduced above, refers to "interstate or foreign travel or transportation in aid of racketeering enterprises." Defendants feel that this title,

in conjunction with legislative history, requires that connection with racketeering enterprises be considered an element of the offense. However, the title of a statute cannot limit the plain meaning of the text, and is resorted to only where ambiguity already exists. Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1946); United States v. Minker, 350 U.S. 179, 76 S.Ct. 281, 100 L.Ed. 185 (1956); Tibke v. Immigration and Naturalization Service, 335 F.2d 42 (2 Cir., 1964). See also Sutherland, Statutory Construction § 4802 (3d ed. Horack 1943). As we have seen above, the body of Section 1952 is clear. There is thus no need to look to the title, an endeavor that in this case would produce, rather than ameliorate, ambiguity.

Were we to seek guidance from the title, however, we would find that it adds nothing to the meaning of the text. The term "racketeering enterprise" is not specifically defined in Title 18, but the terms "racketeering activity" and "enterprise" are defined in 18 U.S.C. § 1961. "Racketeering activity" is defined as "any act which is indictable under any of the following sections of Title 18, United States Code: . . . Section 1952. . . ." Section 1961 (1) (B). "Enterprise" is defined as "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Section 1961 (4). Combining the two definitions a "racketeering enterprise" becomes an individual or group of individuals engaging in acts indictable under § 1952. This definition certainly does not elucidate the elements of a violation of § 1952 itself.

Defendants stress that the legislative history of § 1952 demonstrates that the section can be applied only where

organized crime and racketeering are involved. It is a common rule of statutory interpretation that legislative history not be used to interpret a statute that is clear and unambiguous on its face. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1916); Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949). See also Sutherland, *supra*, § 4502; United States v. Great Northern Ry. Co., 343 U.S. 562, 72 S.Ct. 985, 96 L.Ed. 1142 (1952).

This canon of interpretation is particularly apposite where the legislative history is itself somewhat ambiguous. For example, defendants cite passages in the hearings that indicate that § 1952 was aimed at organized crime.[1] On the other hand, the Ninth Circuit Court of Appeals has found that subsection (b) (2) sought to prevent and punish single criminal acts, not necessarily a continued course of conduct. Marshall v. United States, 355 F.2d 999, 1003 (9th Cir., 1966). Reconciliation of conflicting legislative history, however, is a latter stage of statutory interpretation, not the first step.

Defendants place great reliance on the Supreme Court's decision in Rewis v. United States, *supra*. The convictions in that case centered around an illegal lottery, or numbers operation, in northern Florida. There were essentially two

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[1] For example, the following testimony of Attorney General Robert F. Kennedy appears in the Senate Report (Report No. 644, 87th Cong., 1st Sess., pp. 15-16):

> "The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise."

groups of defendants: 1) a group of customers of the lottery who resided in Georgia and crossed into Florida to place bets, and 2) a group which conducted the gambling operation but never crossed state lines as part of their gambling activities.

As to the first group, the customers, the Court of Appeals held that "the patronizing by interstate gamblers of a gambling establishment" does not fit within the statutory terminology of "promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any unlawful activity." Rewis v. United States, 418 F.2d 1218, 1221 (5th Cir. 1969). The Supreme Court affirmed. 401 U.S. at 810, 91 S.Ct. at 1058.

The second group of defendants, those who operated the numbers operation, were found by the Supreme Court to have been insufficiently related to interstate travel to fall within the Travel Act. That Act, it was held, does not apply to criminal activity "solely because that activity is at times patronized by persons from another State." Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).

Measured by the facts alleged in the indictment, defendants' actions differ from those of both groups of defendants in *Rewis*. Defendants Kahn and Teleprompter are charged with being the perpetrators of the bribery scheme. Unlike the customers of the numbers operation, their acts, if proved, amount to the promotion, management, establishment or carrying on, or the facilitation thereof, of the unlawful activity of bribery.

Defendant Kahn allegedly travelled in interstate commerce to Johnstown to offer the bribe. He also allegedly sent a number of the payments interstate from defendant

Teleprompter to other defendants. The intimate connection between the use of interstate facilities and the crimes charged differentiates these defendants from the second group of defendants involved in *Rewis*. Here, there is no question that the alleged crime of Kahn and Teleprompter is substantially interstate in nature.

Finally, in sustaining the indictment against defendants, the court notes that all other courts that have ruled on this question have upheld the application of § 1952 to isolated instances of extortion and bribery. See Marshall v. United States, 355 F.2d 999 (9th Cir. 1966), cert. denied, 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed.2d 54 (1966); McIntosh v. United States, 385 F.2d 274 (8th Cir. 1967); United States v. Zirpolo, 288 F.Supp. 993 (D.N.J. 1968); rev'd on other grounds, 450 F.2d 424 (3rd Cir. 1971); United States v. Feudale, 271 F.Supp. 115 (D.Conn. 1967).

III. Motion to Dismiss Conspiracy Count

Defendants Kahn and Teleprompter move to dismiss count one of the indictment on the ground that there can be no conspiracy to commit a crime which can only be committed by the concerted action of the parties to the agreement.

Defendants' discussion of the law in this area mistakenly relies on cases concerning conspiracy to commit the substantive crime of bribery. The substantive crime charged in this indictment is not bribery but use of interstate facilities to commit an unlawful act. No concerted action is required to violate § 1952, regardless of whether the underlying unlawful act usually requires joint action,

like bribery, or does not, as with arson. United States v. Parzow, 391 F.2d 240 (4th Cir. 1968); United States v. Zirpolo, *supra*.

IV. Challenge to Grand Jury

Defendants Irving Kahn and Teleprompter Corporation have moved to dismiss the indictment in this case on the grounds that: 1) the grand jury which indicted defendants was constituted in contravention of the standards set forth in the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq.; and 2) the master jury wheel and the jury venire from which defendants' grand jury was chosen did not include, or had an underrepresentation of, the young, the poor, blacks, the poorly educated, and the unskilled, with the result that defendants were denied their constitutional rights under the Fifth and Sixth Amendments.

In conjunction with this motion, defendants Kahn and Teleprompter Corporation have moved on the authority of 28 U.S.C. § 1867(f) to discover a random sampling of the questionnaires completed by prospective jurors in the Southern District of New York; specifically, one quarter of the questionnaires mailed by the Clerk in November, 1969, and returned prior to May 10, 1970, as well as all of the questionnaires completed by members of the grand jury panel from which the grand jury which indicted defendants was selected.[2] Defendants have also moved, pursuant to

[2] According to the affidavit of Michael D. Schmitz, one of the attorneys for defendants Kahn and Teleprompter Corporation, Mr. Schmitz asked former Chief Judge Sugarman of this Court to supply him with the names and juror questionnaires of the jury venire from which defendants' grand jury was selected. The affidavit states that the desired names were given, but that the questionnaires were withheld. The affidavit does not indicate whether a demand was made for every fourth questionnaire mailed in November, 1969, and returned prior to May 10, 1971.

28 U.S.C. § 1867(d), for a hearing on their statutory and constitutional challenges to the grand jury in order to present to the court the questionnaire data sought to be discovered here.

A.

The grand jury in question was selected in accordance with procedures set forth in the "Plan for Random Selection of Grand and Petit Jurors in the United States District Court for the Southern District of New York."[3] This plan was formulated under the authority of 28 U.S.C. § 1863(a) which provides, in part:

> Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title . . .

As the first branch of their argument defendants contend that the Southern District Plan substantially fails to comply with the statutory mandate for the jury selection procedure set forth in § 1863(a) and related sections.

The Southern District procedure for selecting jurors, which first went into effect on December 22, 1968, is basically as follows. The source of names for the master jury wheel is the voter registration lists of the various counties comprising the Southern District of New York, the age of

[3] As amended March 6, 1969, approved by the Reviewing Panel of the Second Circuit, March 6, 1969. The Plan first went into effect on December 22, 1968.

twenty-one being fixed as the minimum age for jury service. Plan, Art. III (A); Art. VI. (1). Names are selected for the master jury wheel at random from each county's registration lists in a proportion equal to the ratio that the number of names on the particular county's lists bears to the total number of names on all of the counties' lists. Questionnaires are then mailed to a certain number of persons randomly chosen from the master jury wheel. Those jurors who qualify on the basis of their completed questionnaires, and are not otherwise excused, are placed on the qualified jury wheel—the source of the grand jury venires and the individual grand juries. The Plan provides that the master wheel be completely emptied and refilled every four years. Art. III. (B).

Defendants challenge several aspects of the Plan as not complying with the Jury Selection and Service Act of 1968. First, they point to the objective of 28 U.S.C. § 1861:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section* of the community in the district or division wherein the court convenes . . . (Emphasis added)

While the statute provides for the use of voter registration lists, or lists of actual voters, as the main source for juror lists, it states that: "The [district court] plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title." 28 U.S.C. § 1863 (b) (2). Defendants contend that the Southern District procedure of relying on voter regis-

tration lists exclusively, leads to the selection of grand juries that do not represent a fair cross section of the community, because certain groups such as the young, the poor, blacks, the poorly educated, and the unskilled do not register to vote in such great numbers as other groups. Thus, defendants maintain that the voter registration lists of the various counties must be supplemented by other lists, such as unemployment rosters or welfare roles.

Another way in which defendants claim the Southern District Plan fails to produce a cross section is by its provision that the master jury wheel be completely emptied and refilled only once every four years. Defendants point out that if the youngest persons on the grand jury wheel are twenty-one when the wheel is first made up from the voter registration lists (these persons having just become eligible to register to vote), these same youngest persons will have almost reached the age of twenty-four before the grand jury wheel is refilled again. Thus, juries constituted towards the end of the four-year period will have no persons of the ages of twenty-one to almost twenty-four on them.

Defendants' third contention relating to the policy of 28 U.S.C. § 1861 is that the requirement that jurors be twenty-one years of age excludes eighteen to twenty year olds in contravention of the cross section requirement. The identical minimum age requirement found in 28 U.S.C. § 1865(b) (1) is interpreted by defendants not to be an absolute requirement, but to indicate merely that the minimum age for jury service is tied to the minimum age for voting. Since the minimum voting age is now eighteen, the minimum age for jury duty must also be set at eighteen.

Before addressing each of the specific claims of defendants it must be made clear that, "While the cross-sectional concept is firmly imbedded in the law, the constitution does not require that the jury or jury venire be a statistical mirror of the community [citations omitted]." United States v. Di Tommaso, 405 F.2d 385, 389 (4th Cir. 1968). See also H.R. # 1076, 1968 U.S.Code Cong. & Adm.News, Vol. 2, pp. 1792, 1794. Not all groups need be represented on the grand jury wheel, nor must the cognizable groups be represented in the same proportions as their proportions in the community.

To prevail on their contentions, defendants must show: first, that the groups in question were cognizable for purposes of defining a fair cross section of the community; and, second, assuming without deciding that it is enough to show that a cognizable group was severely underrepresented, as opposed to systematically excluded, that the groups in issue here were, in fact, underrepresented on the grand jury wheel and in the jury venire.[4]

Turning now to defendants' first claim, defendants have made no showing that indicates that unsupplemented voter registration lists cannot yield a cross section of the community in the Southern District of New York. The Southern District Plan contains an explicit finding by the judges of this Court that,

> "The persons whose names appear on the voter registration lists of the aforesaid eleven counties

[4] Defendants Irving Kahn and Teleprompter Corporation are not members of any of the groups claimed to be excluded or underrepresented here. However, we agree with defendants' contention that one need not be a member of the underrepresented group to challenge a grand jury on cross sectional grounds. Thiel v. Southern Pacific Co., 328 U.S. 217, 223, 66 S.Ct. 984, 90 L.Ed. 1181 (1946).

> [comprising the Southern District] used for the last Federal or State general election represent a fair cross section of the community in the District." Art. III. (A).

Mere conclusory allegations and nationwide statistics regarding the propensity of the young, the poor, blacks, the poorly educated, and the unskilled to register to vote have limited relevance for a challenge to a plan in a particular geographic district. Lower registration of such groups in the South or West may skew nationwide figures so as to make them inapplicable to this District. If defendants' statistics are given weight here, then these very same figures might be used to overthrow juror selction plans relying on voter registration lists, or actual voter lists, anywhere in the country. Had Congress felt that voter lists were inadequate to produce a cross section anywhere in the United States, it would not have selected them as the primary source for jury lists. See 28 U.S.C. § 1863(b) (2), *infra*.[5] Moreover, the case law has consistently held that the exclusion of nonvoters from juries does not impair the cross sectional aspect of such juries. Camp v. United States, 413 F.2d 419, 421 (5th Cir. 1969) and cases cited therein; United States v. Butera, 420 F.2d 564, 573 (1st Cir. 1970) and cases cited therein at n. 21.

Defendants' second contention relates to the provision in the Southern District Plan for completely emptying and refilling the master jury wheel every four years. Defendants maintain that this is in contravention of the def-

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[5] See H.R. #1076, *supra*, at p. 1794:

> "The bill [the Jury Selection and Service Act of 1968], as amended, provides that sources of names other than voter lists may be used to supplement, but not to supplant, voter lists."

initional section of the Jury Selection and Service Act which provides, in § 1869 (c), that: "'voter registration lists' shall mean the official records maintained by State or local officials on persons registered to vote in either the *most recent* State or the *most recent* Federal general election. . . ." (Emphasis added).[6] Defendants read this provision to mean that the master jury wheel must be refilled at least every two years. They rely for this interpretation on a statement in the House Report on the Jury Selection and Service Act which reads: ". . . while the two subsections permit the plan to choose between State and Federal lists, they also insure that the list used will in any event not be more than 2 years old." H.R. # 1076, *supra*, at pp. 1806-07. However, § 1869 (c), as well as the above commentary, can be read to mean that at any time the master jury wheel is to be completely refilled, the most recent voter registeration, or actual voter lists must be used. Such an interpretation is supported by 28 U.S.C. § 1863 (b) (4) which states that, "The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times." See also H.R. # 1076, *supra*, at p. 1800. Surely if Congress had meant to require refilling every two years it would have explicitly so stated.

A four-year period was selected by the Judicial Conference of the United States, by a Special Resolution, and subsequently adopted by the Southern District, because it was thought that there would be a significant change in the registration rolls only at the time of presidential elections. Such a determination carries presumptive

[6] This definition is substantially the same as the definition of the term in the Southern District Plan. See Art. I.(4).

validity.[7] See Thiel v. Southern Pacific Co., 328 U.S. at 220, 66 S.Ct. 984.

The simple answer to defendants' third contention is that if Congress wishes to set the minimum age for jury service at eighteen, rather than at twenty-one, to make the minimum age for jury service and for voting identical, it may do so. In the meanwhile, the Jury Selection and Service Act of 1968 is clear on its face as setting the minimum age at twenty-one.

Defendants cannot have it both ways. They cannot argue here that Congress believed the requirements for voting to be so intimately connected with those for jury service that it set the same minimum age for both, and argue, in support of their first contention, that Congress thought so little of the similarity of qualifications for voting and for jury service that it provided, by 28 U.S.C. § 1863(b) (2), *supra*, for large numbers of nonvoters to serve on juries.

Moreover, it must be noted that the grand jury which indicted defendants was empaneled on July 28, 1970. The Voting Rights Act amendments of 1970 which enfranchised 18 year olds, had not withstood constitutional challenge until December 21, 1970. Oregon v. Michell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272. The Twenty-Sixth Amendment to the Constitution which likewise permitted 18 year olds to vote was not passed and submitted to the States for ratification until March 23, 1971.

Title 28 U.S.C. § 1867 provides the exclusive procedure for challenging a jury on the grounds that it was not chosen

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[7] See letter of Judge Irving Kaufman of the U. S. Court of Appeals, Second Circuit, dated January 20, 1970.

in compliance with the Jury Selection and Service Act of 1968. 28 U.S.C. § 1867 (e). The section provides that:

> In criminal cases . . . the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury. 28 U.S.C. § 1867(a).

Subsection (d) provides that:

> Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commission or clerk, or any other relevant evidence. . . .

Defendants here have not met the requirement of subsection (d) regarding a sworn statement of facts. They have proffered nothing but conclusory allegations and nonspecific national statistics in support of their grand jury challenge. Nor would the discovery of the data defendants seek materially aid their case.

As to some groups, defendants have failed to show that they are cognizable groups for purposes of a cross sectionally valid jury. They have submitted affidavits that are intended to prove that the views of eighteen to twenty-one year olds are significantly different from those of other age groups in the population. Assuming the truth of this allegation for purposes of deciding this motion, defendants have nonetheless failed to show that the attitudes of this

group are inadequately represented by those several years older than they, that is, that eighteen to twenty-one year olds are a distinct, cognizable group. See United States v. Di Tommaso, *supra*, 405 F.2d at 391, citing King v. United States, 346 F.2d 123 (1st Cir. 1965). As to the group of blacks, which is presumptively cognizable because it is a racial group, they have not indicated the actual proportion of this group in the population of the Southern District. Defendants have not defined a specific statistical community in terms of which the racial cross section can be measured.

Though the age group of twenty-one through twenty-five may be a cognizable group for purposes of a cross section, defendants have not shown that this group is statistically severely underrepresented on Southern District voter registration lists.

Defendants also maintain that the poor, the poorly educated, and the unskilled, either as a single group, or as three distinct groups, are underrepresented. They have made no showing statistically, merely asking the court to take judicial notice of the fact that such groups tend to register to vote less, and are thus underrepresented on voter registration lists.

B.

The second branch of defendants' motion is a constitutional challenge to the jury selection procedure employed here, grounded on the due process clause of the Fifth Amendment, as it makes applicable to the federal government the equal protection clause of the Fourteenth Amendment, and on the Sixth Amendment.

Appendix C—Opinion of the District Court

Defendants consistently confuse the issue of the personal right to serve on a grand jury with the issue of the right to have a particular group represented on one's grand jury. The first issue, which pertains to the right of equal protection, is not before the court in this case. Nor can defendants claim that they have been denied a jury of their peers, since defendants are not members of any of the allegedly underrepresented groups.

It is important to note that defendants seem to mistake the standard to be applied for determining whether there is a cross section.

> "It is true that *Rabinowitz* [v. United States, 366 F.2d 34 (5th Cir. 1966)] stated that 'if a fair cross section is consistently lacking, then, without more, it is established that the commissioners have failed in their duty.' 366 F.2d, at 58. But the issue which then emerges is what constitutes a 'fair cross-section.' The district court in the instant case took the position that, absent intentional exclusion, representation of the various relevant elements in the community was enough. We agree. Under the authorities we have cited, we reject defendants' apparent argument that approximately proportional representation of the various identifiable groups in the community is required. If it can be obtained by random selection, proportional representation may be the ideal—because it is the ultimate opposite to intentional exclusion—but it can be achieved only rarely, and then only in regard to some but not all, of relevant criteria. Substantial representation is all that is required." United States v. Di Tommaso, 405 F.2d 385, 390 (4th Cir. 1968). See also, United States v. Butera, 420 F.2d 564, 567 (1st Cir. 1970); United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971).